Supreme Court, U.S.
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No. .....

IN THE

Supreme Court of the United States

October Term, 1979

LOCAL 13889, UNITED STEELWORKERS OF AMERICA,

Petitioner,

v.

CHARLES W. SMITH, JOHN PASLEY AND RALPH SERINI,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Local 13889, United Steelworkers of America prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

Jurisdiction.

OPINIONS BELOW

The court of appeals issued a series of opinions in this case, none of which is officially reported. The first, decided by a panel, is reproduced in the Appendix to this petition at App. 57a-86a.[1] The second, decided by the court *en banc,* is reproduced in the Appendix at App. 4a-56a. The third, an order issued *en banc,* clarifying the second opinion, is reproduced in the Appendix at App. 2a-3a. The fourth, an order issued by the court of appeals denying your petitioner's renewed petition for rehearing and suggestion for rehearing *en banc,* is reproduced in the Appendix at 1a. There are two opinions of the district court. The first is reported at 433 F. Supp. 690 and is reproduced in the Appendix at App. 87a-93a. The second is reported at 442 F. Supp. 1144 and is reproduced in the Appendix at App. 94a-98a.

JURISDICTION

The original panel opinion of the court of appeals was issued on January 3, 1979. Thereafter, upon a petition for rehearing, the court of appeals issued a decision *en banc* on January 21, 1980, modifying the judgment entered by the panel. A second petition for rehearing was filed following which the court of appeals issued an order on March 26, 1980, clarifying its first *en banc* opinion. That order, in turn, prompted a renewed petition for rehearing which the court of appeals denied in an order entered April 30, 1980. Petitioner's motion for extension of time in which to file a petition for certiorari

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1. The Appendix to this petition is separately paginated and is referred to herein as "the Appendix." Citations are to "App."

to and including June 17, 1980 was presented to and granted by Justice Blackmun. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Instructions encompassing three alternative theories of liability are submitted, over timely objection, to the jury which returns a general verdict in plaintiffs' favor. The court of appeals later holds that at least one of those theories was improperly submitted to the jury. The question presented is whether, in these circumstances, the court of appeals should have remanded for a new trial rather than sustaining, as it did, the jury's award.

STATEMENT OF THE CASE

Proceedings Below

This action was filed by four employees against Hussmann Refrigerator Company (hereinafter "Company" or "Hussmann") and Local 13889, United Steelworkers of America (hereinafter "Union") charging the former with breach of a collective bargaining agreement and the latter with breach of the duty of fair representation. In addition, one of the four, a black male, alleged that both defendants had discriminated against him on the basis of race in violation of 42 U.S.C. §§ 1981 and 1985. The case arose out of a job promotion dispute in which an arbitrator ruled that Hussmann violated the contract when it awarded the disputed jobs to plaintiffs rather than two employee grievants senior to plaintiffs. Plaintiffs' breach of contract and fair representation claims were tried to a jury which rendered a general verdict against both defendants and awarded two

of the plaintiffs damages. In addition, the jury recommended certain equitable relief, including assignment of plaintiffs to the disputed job classification. Defendants filed motions for judgment notwithstanding the verdict, or, alternatively, for a new trial. At the same time, plaintiffs sought a supplementary judgment implementing the jury's advisory verdict.

The district court issued a memorandum opinion and order denying plaintiffs' motion and granting defendants' motions to set aside the verdict and enter judgment for defendants. Earlier, the district court had removed the race discrimination claims from jury consideration, and finding evidence of racial bias wholly lacking, entered judgment for defendants on those claims.

Plaintiffs appealed. After a panel decision and two opinions on rehearing, a majority of the court of appeals, sitting *en banc,* reversed the district court's judgment with respect to the breach of contract and fair representation claims, reinstated the jury's damage award, and remanded so the district court might consider the jury's advisory recommendation for equitable relief. At the same time, the court of appeals unanimously affirmed the district court's judgment with respect to the race discrimination claims.

The Facts

As indicated, this case relates to a dispute between junior and senior employees (App. 3a). The dispute had its inception in April and May of 1975, when, pursuant to the provisions of the collective bargaining agreement, the Company posted a series of openings for temporary and permanent maintenance pipefitter positions. Even-

tually, four permanent positions were posted. From among groups of bidders interviewed by the maintenance foreman, the Company filled the vacancies on the basis of skill and ability—as determined from the interviews (App. 7a). Some twenty-six unsuccessful bidders filed grievances challenging the Company's selections (App. 8a).[2] The Union chose but four to process, namely, those which had been filed by employees with greater seniority than the bidders to whom Hussmann had awarded the jobs. The Union processed the cases through arbitration where it called the four senior grievants as witnesses. For its part, the Company defended selection of the plaintiffs for the job. It did so on the ground that they possessed more relative skill and ability than the grievants and it called the maintenance foreman to back up that contention. He testified to the

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2. The collective bargaining agreement provided in relevant part:

"ARTICLE 9

Seniority

SECTION 1. The Company recognizes the principles of classification seniority and seniority based upon the total length of continuous service with the Company.

* * * *

Seniority, skill and ability to perform the work required shall be considered by the Company in making promotions, transfers, layoffs and callbacks. Where skill and ability to perform are substantially equal, seniority shall govern. * * *

* * * *

[ARTICLE 10]

SECTION 2. Ability and required performance of an employee on the job shall be factors considered for promotion. When such factors are substantially equal between those being considered, seniority shall govern. * * *" (App. 41a).

skills and abilities of all contestants as revealed in the interviews on which he had made his decision (App. 8a).

On October 3, 1975, the arbitrator issued his award. He denied two of the grievances on the grounds that the grievants lacked substantial equality of skill and ability. But, he granted the other two on the grounds, in one case, that the grievant was separated from his junior competitor by only a hairline, and in the other case, that grievant's skill and experience were substantially similar to those of at least two successful bidders. The arbitrator ordered Hussmann to place the two winning grievants on the jobs with retroactive seniority and back pay (App. 8a-9a, 43a-47a).

A controversy then erupted over the meaning and application of the award. Thus, Hussmann originally interpreted the arbitrator's decision as awarding the classification to all six employees, that is, the two winning grievants plus all the Company's four choices for the job. The Union, however, objected to this reading of the award, arguing that the arbitrator did not have authority to create six maintenance pipefitter classifications from four posted jobs.[3] In addition, the award had two technical errors: it misstated the seniority of one plaintiff, giving him ten years more seniority than he actually had, and it awarded another of the junior employees a position for which he had not bid (App. 9a, 90a, 95a-96a).

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3. This was significant because, by contract, employees holding the classification have priority in filling vacancies. Thus, an interpretation producing two extra "incumbents" would remove two future vacancies from competition. Recognizing this "edge," plaintiffs testified that they would have been satisfied with such a resolution of the dispute (App. 9a).

Officials of the Union and the Company met to discuss these problems with the award and came to a tentative agreement. Since the Company had posted only four jobs, only four employees should be granted the classification; those employees would be the two successful grievants and the two most senior of the four bid awardees. To cure these ambiguities and errors in the award and to avoid problems in its administration, the parties returned to the arbitrator for clarification (App. 9a, 61a, 90a, 96a). A meeting for this purpose was held October 31, 1975. No additional testimony was taken and no employees were present except the representatives of Hussmann and the Union. The parties informed the arbitrator of their prior discussions and presented him the supporting documentary evidence, including bid sheets, seniority lists and personnel records (App. 9a, 61a-62a). They asked him to rank the persons entitled to the jobs (App. 96a).

The arbitrator's supplemental and corrective decision, issued November 4, 1975, awarded the pipefitter classification to four employees, consistent with the joint position of the parties, and in the order of the employees' seniority. Two plaintiffs thus lost the classification. Of course, they were entitled to be paid for the time they actually performed the job, but on any future pipefitter vacancies their bid would be considered on the same basis as any other employee without seniority in the classification (App. 9a-10a).

Thereafter, plaintiffs attempted to file grievances to challenge the November 4 arbitration decision. The Union refused to process the grievances, relying on the language of the collective bargaining agreement that requires an arbitrator's decision to be considered the final and binding resolution of a dispute (App. 10a-11a).

THE DECISIONS BELOW

District Court

Following presentation of the evidence, the trial court submitted three alternative theories of liability to the jury, in the form of "verdict directors," instructing as to each that if the jury should find that plaintiffs established, by a preponderance of the evidence in the case, certain enumerated facts, then the verdict should be for the plaintiffs and against the Union.[4]

The three theories of liability encompassed in the verdict directors were (insofar as they related to the Union) as follows:

(a) that the Union breached its duty of fair representation by its conduct in processing the initial seniority grievances to arbitration,

(b) that the Union breached its duty of fair representation by its conduct in resubmitting the matter to the arbitrator following the arbitrator's initial decision, and

(c) that the Union breached its duty of fair representation by its conduct in refusing to accept or process the grievances submitted by plaintiffs following the arbitrator's second decision.

The jury returned a general verdict in favor of each of the plaintiffs which did not specify which of the theories of liability it found supported by the evidence.

In granting defendant Union's motion for judgment notwithstanding the verdict, the district court held, as a

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4. The Union timely objected to the instructions on the grounds that they were inconsistent with the evidence and the law.

matter of law, that the Union did not breach the duty of fair representation either by its conduct in the first arbitration hearing or in the resubmission to the arbitrator nor was there any such breach in the Union's refusal to accept plaintiffs' grievances following the arbitrator's supplemental decision (App. 96a-98a).

Court of Appeals

1. Panel Decision

On appeal, the matter first came before a panel (then Chief Judge Gibson, Circuit Judge Henley, and District Judge Eisele). The panel found no breach of contract by Hussmann (App. 84a). With respect to the Union, it reversed the trial court on the ground that though the Union was not hostilely motivated toward the plaintiffs, it nevertheless breached its duty of fair representation by basing its decision to process the grievances solely on the principle of seniority, ignoring plaintiffs' skill and ability (App. 74a-75a).[5] The panel

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5. The policy underlying the panel's rationale is set forth in the following passage from the opinion:

> "Contrary to the arguments of the union, seniority is not a 'neutral' principle. A seniority system is value-laden, embodying many salutary and legitimate expectations of labor. These systems promote job security and acknowledge the values of longer service, such as demonstrated loyalty and greater experience. However, not all of the values embodied in the principle of seniority favor the best interests of labor or society. The use of seniority in making promotions may sometimes frustrate the basic purposes of congressional labor legislation and the united labor movement. It can diminish worker satisfaction and obstruct efficient production, thus lowering productivity. As a matter of common

rejected the other two theories which had been urged in support of finding a violation. First, it regarded the request by Hussmann and the Union for clarification as proper and concluded that plaintiffs were not prejudiced by the failure to notify them of the second arbitration (App. 80a-81a). Second, it concluded that in rejecting plaintiffs' grievances, the Union acted in good faith, relying reasonably on the final and binding clause of the collective bargaining agreement (App. 81a).

2. Opinion on Rehearing

The Union sought rehearing *en banc* and the request was granted.[6] Though the panel's opinion was withdrawn, the outcome remained the same for on rehearing, a majority of the court *en banc* held to the view that the Union had breached its duty of fair representation—albeit on different grounds than those relied on by the panel. Indeed, on rehearing the court of appeals divided into four camps.

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sense, verified by behavioral science, a company must be able to reward employees for superior ability and performance or face a loss of its most competent employees and an increase in worker frustration and idolence.

"The union's choice to process all grievances based on seniority unfairly discriminated against employees receiving promotions on the basis of merit. This conduct may be viewed as a perfunctory dismissal of the interests and right of plaintiffs. * * *" (App. 75a).

6. In its petition, the Union pointed out that even if the panel's rulings of law were correct, its rejection of two of the theories which had been submitted to the jury required that the jury award be set aside and the case remanded for a new trial (Union's Petition for Rehearing, pp. 12-13).

The Decisions Below.

Chief Judge Gibson, in an opinion joined by Circuit Judges Henley and McMillian, held that the jury could have found a breach of the duty of fair representation from any of the following acts of the Union:

1. Adhering to the principle of seniority in processing grievances which challenged the Company's merit-based promotion choices (App. 20a-25a), and by other conduct in connection with the first arbitration hearing (App. 25a-27a).
2. Resubmitting the award to the arbitrator for clarification (App. 28a-30a).
3. Failing to accept and process plaintiffs' grievances (App. 30a-31a).

Circuit Judges Bright and Ross concurred in Judge Gibson's opinion except that portion relating to the failure of the Union to properly represent the plaintiffs in the first arbitration hearing. They went on to say, however, that in their judgment a jury could find that the Union was derelict in not giving the plaintiffs adequate notice of the time, place and nature of the first hearing (App. 39a). Circuit Judge Lay also concurred but on the narrow ground that the agreement by the Company and the Union to go back to the arbitrator was not disclosed to the plaintiffs. In his view, that was the only evidence of bad faith in the record (*id.*).

Circuit Judges Heaney and Stephenson filed a vigorous dissent in which they argued that the Union did not violate its duty of fair representation by any of the conduct cited above (App. 40a-41a). Moreover, they pointed out, even if two theories were upheld, the case would have to be remanded for a new trial inasmuch as the court had no way of knowing on what theory the jury found liability (App. 55a-56a).

3. CLARIFICATION

Hussmann sought rehearing of the *en banc* decision. The court of appeals denied the petition, but issued an order clarifying the majority's determinations as follows:

1. The evidence failed to establish that the Union breached its duty of fair representation to the plaintiffs at the first arbitration by advocating the promotion of employees senior to plaintiffs.
2. Subsequent collaboration between the Company and the Union for purposes of obtaining a modification of the arbitration award, without notice to the plaintiffs, operated to deprive them of valuable employment rights and constituted sufficient evidence for a jury to decide that the Union had breached its duty of fair representation.
3. The jury's damage award is sustained[7] (App. 2a-3a).

Following issuance of the Court's order, the Union filed a renewed petition for rehearing to make a single point. Noting that the jury in this case had been instructed that it could return a verdict in favor of plaintiffs on any one of the three alternative theories, and that the court of appeals had now made clear that at least one of those theories should not have been submitted to the jury, we pointed out that under well established law, the general jury verdict could not stand.

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7. The theories of liability had thus become inverted since the panel's decision. The *en banc* court found a violation on the two theories which the panel had rejected, and it repudiated the one theory which the panel had sustained.

Accordingly, the proper disposition of the appeal was a remand for a new trial. On April 30, 1980, the court of appeals denied the Union's renewed petition without comment (App. 1a).

REASONS FOR GRANTING THE WRIT

This is a case in which several alternative theories of liability are submitted to the jury which then returns a general verdict in favor of the plaintiffs. The court of appeals ultimately decides that at least one of those theories was erroneously submitted. Though it is impossible to determine with certainty the theory upon which the jury based its verdict, the court of appeals nevertheless upholds the verdict rather than remanding for a new trial. Its judgment doing so squarely conflicts with applicable decisions of this Court, going back one hundred years. Indeed, because the lower court's failure to apply this Court's decisions—of which it was fully apprised—is so clearly in error, we respectfully request that its judgment be reversed summarily.

The error is manifest from a simple review of the proceedings.

1. The trial court submitted three alternative theories of liability to the jury, in the form of "verdict directors," instructing as to each that if the jury should find that plaintiffs established the enumerated facts by a preponderance of the evidence, then the verdict should be for the plaintiffs and against the Union. The jury thus was instructed to return a general verdict for the plaintiffs if it found *any one* of the three theories established, by a preponderance of the evidence.

2. The Union timely objected to the trial court's submission of the verdict directors on the grounds, *inter alia,* that the directors were inconsistent with the evidence and the applicable case law.

3. The three theories of Union liability encompassed in the verdict directors were:

a. that the Union breached its duty of fair representation by its conduct in processing the initial seniority grievances to arbitration;

b. that the Union breached its duty of fair representation by its conduct in resubmitting the matter to the arbitrator following the arbitrator's initial decision; and

c. that the Union breached its duty of fair representation by its conduct in refusing to accept or process the grievances submitted by plaintiffs following the arbitrator's second decision.

4. The jury returned a general verdict in favor of each of the plaintiffs which did not specify which of the theories of liability it found supported by the evidence. It is possible that the jury found for the plaintiffs only on the first issue, only on the second, only on the third, or on some combination of the three.

5. The district court granted defendants' motion for a judgment notwithstanding the verdict (alternatively, defendants had asked for a new trial). The original panel decision of the court of appeals held that the jury could have found a breach of the duty of fair representation under the first of the above theories, but not on the strength of the other two. The latter, it ruled, were lacking in legal merit.

6. The Union thereupon petitioned for a rehearing *en banc*. The panel's rejection of two theories and its reinstatement of the jury verdict squarely presented the remand problem. Accordingly, in its petition, the Union specifically pointed out that even if the panel's rulings of law were correct, its rejection of two of the theories which had been submitted to the jury required that the jury award be set aside and the case remanded for a new trial (Union's Petition for Rehearing, pp. 12-13).

7. The January 21, 1980 decision of the court of appeals *en banc*, as clarified by its subsequent March 26th order, clearly holds that "the evidence failed to establish that the Union breached its duty of fair representation to appellants . . . at the first arbitration . . ." (App. 2a-3a). This holding confirms the correctness of the Union's timely objection in the district court that the "verdict director" relating to this theory of liability was "inconsistent [with] the evidence" and should not have been submitted to the jury. The order of clarification is silent with respect to another of the theories of liability submitted to the jury in another of the "verdict directors"—i.e., that the Union breached its duty by refusing to accept or process the plaintiffs' grievances but, for purposes of analysis, we assume that only one of the verdict directors was erroneously submitted.

8. Following issuance of the court's order of clarification, the Union filed a renewed petition for rehearing grounded entirely on the court's failure to remand for a new trial, given its rejection of at least one of the three theories submitted to the jury. The petition was denied without comment.

In light of the foregoing, it is possible that the jury ruled for plaintiffs only on the theory of liability for

which the court of appeals found no evidentiary foundation, i.e., the claim respecting the Union's conduct up to and including the first arbitration. The jury returned a general verdict for the plaintiffs and the judge's instructions would have required that course even if that were the only theory of liability which the jury thought proved. Inasmuch as the court of appeals ultimately found that there was no evidence to support that theory of liability, it was error for the trial judge to submit that theory to the jury over the Union's timely objection. As a matter of law, that error was prejudicial.

This Court has consistently held over a span of one hundred years that where a case is submitted to a jury upon several theories, one of which turns out to be erroneous, and a general verdict has been returned, that verdict cannot be upheld for the simple reason that it is impossible to determine whether the jury reached its verdict on a correct theory or an erroneous one. The proper disposition in such cases is not to sustain the jury's award, but to remand for a new trial on the theory or theories which could properly be submitted to jury. *Maryland v. Baldwin,* 112 U.S. 490, 493 (1884); *Wilmington Star Min. Co. v. Fulton,* 205 U.S. 60, 79 (1907); *Stromberg v. California,* 283 U.S. 359, 367-368 (1931); *Sunkist v. Winckler & Smith Co.,* 370 U.S. 19, 29-30 (1962); *New York Times Co. v. Sullivan,* 376 U.S. 254, 284 (1964).

There are no technical obstacles to such a disposition. Petitioner filed timely objections to the jury instructions and moved for a new trial in the district court. It raised the matter in the court of appeals at the earliest opportunity and again on a later occasion.

Conclusion.

Finally, the Supreme Court decisions cited in this petition were cited to the court of appeals. We are aware of no ground on which these decisions can be distinguished nor has any been suggested by the plaintiffs. In a word, the judgment of the court of appeals squarely conflicts with an unbroken chain of decisions of this Court and nothing has been cited which explains the departure. In the circumstances it is appropriate that the judgment of the court of appeals be summarily reversed and the case ultimately remanded to the district court for a new trial.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari to review the judgment below and should issue an order reversing and remanding said judgment.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1979

Nos. 78-1034; 78-1073 & 78-1092. CHARLES W. SMITH, et al, Appellants/Cross-Appellees, v. HUSSMANN REFRIGERATOR CO., et al, Appellees/Cross-Appellants.	Appeals from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellee, Local 13889, United Steelworkers of America, and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, is is ordered that the petition for rehearing also be, and it is hereby, denied.

April 30, 1980

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1034

No. 78-1073

No. 78-1092

CHARLES W. SMITH, JOHN PASLEY, and RALPH SERINI, Appellants, Cross-Appellees,

v.

HUSSMANN REFRIGERATOR COMPANY and LOCAL 13889, UNITED STEELWORKERS OF AMERICA,

Appellees, Cross-Appellants.

Appeals from the United States District Court for the Eastern District of Missouri.

Filed: March 26, 1980

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and MCMILLIAN, Circuit Judges.

ORDER ON PETITION FOR REHEARING

The petition for rehearing is denied.

We observe that the petition of Hussmann Refrigerator Company reflects some confusion as to the precise holding of the court in this case. In light of the several opinions written, this court believes it might be appropriate to summarize below the determinations by the majority.

Appendix.

1) In this case, relating to a dispute between junior and senior employees, the evidence failed to establish that the Union breached its duty of fair representation to appellants Smith, Pasley, and Serini at the first arbitration by advocating the promotion of employees senior to appellants.

2) The subsequent collaboration between the employer, Hussmann Refrigerator Company, and the Union, for the purpose of obtaining a modification of the previous arbitration award, without notice or opportunity to junior employees Smith, Pasley, and Serini to protect their rights, operated to deprive appellants of valuable employment rights and constituted sufficient evidence in this case for a jury to decide that the Union had breached its duty of fair representation to appellants and that the Company had breached its collective bargaining agreement.

3) The damage award is sustained. The appellants' claim for equitable relief is remanded to the district court in accordance with part VI of the opinion.

We join in this order for purposes of clarification, notwithstanding adherence to separate views as set forth in the opinion of then Chief Judge Gibson, joined by Judges Henley and McMillian, the concurring opinion of Judge Lay, now Chief Judge, the separate concurrence of Judges Bright and Ross, and the dissent of Judges Heaney and Stephenson.

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1034

No. 78-1073

No. 78-1092

CHARLES W. SMITH, JOHN PASLEY, and RALPH SERINI, Appellants, Cross-Appellees,

v.

HUSSMANN REFRIGERATOR COMPANY and LOCAL 13889, UNITED STEELWORKERS OF AMERICA, Appellees, Cross-Appellants.

Appeals from the United States District Court for the Eastern District of Missouri

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Submitted: September 10, 1979
Filed: January 21, 1980

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and MCMILLIAN, Circuit Judges, *en banc*.

GIBSON, Chief Judge.

Plaintiffs Charles Smith, John Pasley and Ralph Serini brought suit in the United States District Court for the Eastern District of Missouri against Hussmann Refrigerator Company (hereinafter referred to as Hussmann or the company) and Local 13889, United Steelworkers of America (hereinafter referred to as the

union) for breach of the collective bargaining agreement and breach of the duty of fair representation. In Counts II and III, plaintiff Pasley, a black male, charged violations of 42 U.S.C. §§ 1981 and 1985 (1976), alleging that defendants discriminated against him on the basis of his race by denying him the right to make and enforce contracts and by conspiring to deprive him of the equal protection of the law.

The claims of breach of the collective bargaining agreement and breach of the duty of fair representation were tried to a jury which rendered a verdict against both defendants in favor of plaintiff Smith in the amount of $6500 and plaintiff Pasley in the amount of $2500. Also, in response to special interrogatories, the jury found that plaintiffs Smith and Serini should be awarded the classification of maintenance pipefitter, and that plaintiff Pasley's seniority in the pipefitter classification should be upgraded. The District Court[1] entered judgment in accordance with the jury verdict, but subsequently denied plaintiffs' motion for a supplementary judgment to effect the advisory opinion of the jury represented by the answers to special interrogatories, and granted defendants' motions for judgments notwithstanding the verdict.[2] Plaintiffs Pasley, Smith and Serini appeal from the grant of defendants' motions and the denial of their motion. They request reinstatement of the jury verdict and an order implementing the jury's advisory opinion.

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1. The Honorable John F. Nangle, United States District Judge, Eastern District of Missouri.

2. The District Court opinion is reported at 442 F. Supp. 1114 (E.D. Mo. 1977).

The claims of race discrimination set forth in Counts II and III were removed from jury consideration, and the court, finding no evidence of racial discrimination, determined that neither defendant had violated 42 U.S.C. §§ 1981 and 1985.[3] Plaintiff Pasley claims error in the removal of this claim from the jury and also appeals from the decision on its merits.

On cross-appeal, defendants argue that if the judgment notwithstanding the verdict is reversed, they are entitled to a new trial for the reasons that plaintiffs had no right to a jury trial; certain jury instructions were improper; the District Court erred in excluding evidence of the National Labor Relations Board's (NLRB) dismissal of plaintiffs' charges of unfair representation; and the award indicates that the jury was impassioned or confused.

This appeal was initially submitted to a panel of this court which issued an opinion on January 3, 1979. Thereafter a petition for rehearing en banc was filed and granted. The panel opinion is hereby vacated and the judgment is modified in accordance with this opinion. We affirm the District Court's judgment on Counts II and III of the complaint but reverse the District Court's granting of the motions notwithstanding the verdict and reinstate the jury verdict against Hussmann and the union. We further remand to the District Court for reconsideration of whether the jury's advisory opinions regarding classification and seniority status should be implemented.

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3. The District Court opinion is reported at 433 F. Supp. 690 (E.D. Mo. 1977).

Appendix.

I.

At all times relevant to this proceeding, plaintiffs were employees at Hussmann's Bridgeton, Missouri, plant and were members of the union, and a collective bargaining agreement between defendants was in effect pursuant to which the union represented approximately 1500 production and maintenance employees at Hussmann's Bridgeton plant. This agreement specifically provided that in the matter of promotions seniority should govern when the factors of ability and skill are substantially equal between those being considered.[4]

On April 22, 1975, Hussmann, in accordance with the collective bargaining agreement, posted two openings for temporary positions as maintenance pipefitters. Sixty-four employees bid for these openings. Hussmann's maintenance foreman, Schwartz, interviewed groups of the most senior employees and selected Pasley and Smith on the basis of superior skill and ability. On May 6, 1975, Hussmann posted an opening for a permanent maintenance pipefitter. Although forty-six employ-

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4. The collective bargaining agreement provides in relevant part:

> Article 9, SECTION 1. * * *
>
> Seniority shall be by job classifications unless otherwise specified below.
>
> Seniority, skill and ability to perform the work required shall be considered by the Company in making promotions, transfers, layoffs and callbacks. Where skill and ability to perform are substantially equal, seniority shall govern. * * *
>
> Article 10, SECTION 2. Ability and required performance of an employee on the job shall be factors considered for promotion. When such factors are substantially equal between those being considered, seniority shall govern. * * *

ees bid for this position, it was awarded to Pasley since he was already working in the classification. Three more positions in this classification, one permanent and two temporary, opened on May 13, 1975. An employee who had previously held the classification received the permanent job. Plaintiff Serini and another employee, Watson, received the temporary positions. Subsequently, plaintiff Smith bid into a permanent position as maintenance pipefitter as a result of an opening posted May 20, 1975.

Twenty-six unsuccessful bidders filed grievances claiming that Hussmann had violated the collective bargaining agreement in making the promotions. Of these grievances, the union selected four to process. These four had been filed by employees with greater seniority than the successful bidders. The union processed these grievances through the five-step grievance and arbitration procedure, as described in the collective bargaining agreement.

At the arbitration hearing, the union called each of the four grievants to testify about his skill and ability. The successful bidders were not invited to attend the hearing and their only representation was presented by Hussmann's foreman, Schwartz, who related the substance of his interviews with the successful bidders as well as the substance of his interviews with the grievants.

On October 3, 1975, the arbitrator issued his award. He clearly denied two of the grievances on the grounds that the grievants lacked substantial equality of skill and ability. The arbitrator granted two grievances, those of Dattilo and Krassinger, and ordered Hussmann to give them the jobs with retroactive seniority and

back pay. Further, the award named as those entitled to hold the maintenance pipefitter classification: Dattilo, Pasley, Smith, Watson, Krassinger and Serini.

Hussmann originally interpreted the arbitrator's decision as awarding the classification to all six employees named, with their seniority in the classification in the order listed. While the plaintiffs did not rejoice at this outcome, they were satisfied with this resolution of the dispute because they retained the classification.[5] The union, however, objected to the award arguing that the arbitrator did not have authority to create six maintenance pipefitter classifications from four posted jobs. In addition the award had two technical errors: it misstated the seniority of plaintiff Smith, giving him ten years more seniority than he actually had, and awarded Watson a position for which he had not bid.

Officials of the union and the company met to discuss these problems with the award. At this time they agreed that only four employees should be granted the classification and that those employees would be Dattilo, Krassinger, Watson and Pasley. Then, ostensibly to seek "clarification" of the award, they returned to the arbitrator. A meeting for this purpose was held October 31, 1975. No additional testimony was taken and no employees were present except the representatives of Hussmann and the union. The parties informed the arbitrator of their prior agreement and presented him with the correct seniority dates and bid sheets.

The arbitrator's supplemental and corrective decision, issued November 4, 1975, awarded the pipefitter

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5. The mere status of the classification was important because employees with the classification have priority in filling vacancies.

classification to the four most senior employees in the order of their seniority. Thus, Dattilo, Krassinger, Watson, and Pasley received the classification.[6] Smith and Serini were entitled to be paid for the time they actually performed the job, but on any future vacancies their bid would be considered on the same basis as any other employee without seniority in the classification. This decision, however, retained the error in plaintiff Smith's seniority, which the arbitrator later corrected after it was brought to his attention.

At the time of the second meeting with the arbitrator, the parties also agreed that a grievance filed against Serini by another employee, Pogue, would be processed against Pasley instead of Serini. At the time Pogue filed the grievance, Serini appeared to hold the fourth senior position in the classification, but by the time the union arbitrated the grievance Pasley held that position. Pasley requested permission to be present at this arbitration hearing, but his request was denied. Pogue attended the hearing at the union's invitation. Subsequently, Pogue's grievance was denied.

Plaintiffs, who had learned from a union official the result of the second meeting with the arbitrator before he issued his decision, attempted to file grievances to challenge the November 4 arbitration decision. Smith and Serini alleged that they were entitled to the classification, and Pasley challenged the realignment of his seniority. The union refused to process the grievances,

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6. Because the arbitrator demoted Pasley to the lowest seniority in the classification, he was temporarily removed from the position due to a reduction in the work force. He subsequently bid back into the position and held it at the time of trial.

relying on the language of the collective bargaining agreement that requires an arbitrator's decision to be considered the final resolution of a dispute. In the process of trying to file his grievance, plaintiff Smith asked the president of the local union if he could be permitted to speak at a regular monthly union meeting in order to bring the matter before the membership. He was told that he would not be given the floor. Plaintiff Serini mailed a written request to the union to have the matter placed on the agenda of the next monthly scheduled meeting of the local union, but he never received a response to this request. Union officials, however, did report the results of the arbitration hearings to the membership at a regular meeting.

II.

On appeal, plaintiffs contend that the District Court erred in granting the defendants' motions for judgment notwithstanding the verdict because the jury was properly instructed on the relevant law and was presented with sufficient evidence to find that the union had breached its duty of fair representation and that defendants breached the terms of the collective bargaining agreement.

The standard for granting judgment notwithstanding the verdict is the same as for a directed verdict. *Schneider v. Chrysler Motors Corp.*, 401 F.2d 549, 554 (8th Cir. 1968). As stated by this court in *Lord v. Wilkerson*, 542 F.2d 1034, 1035 (8th Cir. 1976):

> A motion for a directed verdict should be granted "only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Bar-*

clay v. Burlington Northern, Inc., supra, 536 F.2d at 267; *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co.,* 523 F.2d 833, 836 (8th Cir. 1975). As this Court has noted,

> [A] motion for a directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions. * * * In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. (Citations omitted.)

Vickers v. Gifford-Hill and Co., 534 F.2d 1311, 1315 (8th Cir. 1976), *quoting Giordano v. Lee,* 434 F.2d 1227, 1231 (8th Cir. 1970), *cert. denied,* 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed.2d 709 (1971).

See also Voegeli v. Lewis, 568 F.2d 89, 92 (8th Cir. 1977); *Banks v. Koehring Co.,* 538 F.2d 176, 178 (8th Cir. 1976); *Griggs v. Firestone Tire and Rubber Co.,* 513 F.2d 851, 857 (8th Cir.), *cert. denied,* 423 U.S. 865 (1975).

After a careful review of the jury instructions and the evidence, we conclude that the jury's verdict should have been upheld and reverse the judgment of the District Court on this matter.

III.

The duty of fair representation developed as a corollary to the collective bargaining system promoted by Congress and administered by the NLRB. This system grants to a union the power to act as exclusive bargain-

ing representative and necessarily subordinates the interests of an individual employee to the collective interests of all employees in the bargaining unit. *Vaca v. Sipes,* 386 U.S. 171, 182 (1967). Because of the reduction in the individual rights of employees thus represented by a union, the controlling statutes have long been interpreted as imposing upon the union, as exclusive bargaining agent in the negotiation and administration of the collective bargaining contract, a responsibility and duty fairly to represent as individuals as well as collectively the employees within the bargaining unit. *Humphrey v. Moore,* 375 U.S. 335, 342, (1964); *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337-38; *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192, 202 (1944).

The rationale for this satutory interpretation was clearly expressed by the United States Supreme Court:

> It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 202 (1944).

While the scope of the duty of fair representation has never been precisely defined, it "is a legal term of art, incapable of precise definition," and calls for an ad hoc review of each factual situation, *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 469 F.2d 181, 182 (4th Cir. 1972); its evolution through the

fires of court decisions leaves no doubt about its purpose. *St. Clair v. Local Union No. 515 of the International Brotherhood of Teamsters*, 422 F.2d 128, 130 (6th Cir. 1969). The duty of fair representation balances the collective and the individual interests of employees in the bargaining unit as these interests are represented by a labor organization in order to promote the goals of congressional labor legislation, to minimize industrial strife and encourage full production.[7] In particular, "the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of

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7. 29 U.S.C. § 141(b) (1976) provides:

> (b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
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> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes, supra,* 386 U.S. at 182.

In order to meet its purpose, the scope of the duty of fair representation is in some ways very broad. The responsibility fairly to represent employees is equal in scope to the union's broad authority in the negotiation and administration of the collective bargaining agreement. *Humphrey v. Moore,* 375 U.S. 335, 342 (1964). Thus the duty attaches to all stages of the negotiation and administration process and is owed to all employees within the unit represented. However, because of the need to balance the individual interests of employees with their collective interests, the duty of fair representation must not be construed to subvert the basic purposes of organized labor by inhibiting union representation of collective interests. The Supreme Court has stated that in the negotiation process, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman, supra,* 345 U.S. at 338. The standard by which to measure union conduct was further defined in *Vaca v. Sipes,* 386 U.S. 171 (1967). In the administration of the collective bargaining agreement, the union has "a statutory obligation to serve the interests of all members [of a designated unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. *See also King v. Space Carriers, Inc.,* No. 78-1873, slip. op. at 7-8 (8th Cir. October 16, 1979).

The Fourth Circuit Court of Appeals clearly articulated the import of *Vaca* in *Griffin v. International*

Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F.2d 181, 183 (4th Cir. 1972):

> A union must conform its behavior to each of these three separate standards. First, it must treat factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.
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> * * * Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

IV.

Applying this standard to the union's conduct in processing the grievances challenging plaintiffs' promotions, we find that sufficient evidence existed for the jury to conclude that the union exceeded the permissible range of reasonableness with regard to its representation of plaintiffs. There can be no question that the scope of the duty of fair representation encompasses plaintiffs' interests in this situation. Plaintiffs were employees within the bargaining unit and processing grievances is within the broad authority of the union as the employees' exclusive agent in the administration

of the collective bargaining agreement.[8] *See Vaca v. Sipes, supra,* 386 U.S. at 177. The processing of the grievances against plaintiffs was intended to and did decide plaintiffs' rights to the promotions, which plaintiffs had received from management on the basis of their superior skill and ability. *See Tedford v. Peabody Coal Company,* 533 F.2d 952, 959 (5th Cir. 1976) ("the union in making its decision not to put [grievant] back in his old position had a duty to consider not only the interests of [the grievant] but also those of the twelve employees who would suffer from the resulting roll-back * * *."); *Bond v. Local Union 823, International Brotherhood of Teamsters,* 521 F.2d 5, 9 (8th Cir. 1975) (union processed "test" case grievance rather than plaintiff's grievance. This is analogous to when a union processes the grievances of some employees regarding

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8. The collective bargaining agreement between Hussmann and the union granted to the union the exclusive power to process and settle grievances and to carry cases to arbitration.

> By virtue of this contractually derived status as the exclusive enforcer of the collective agreement, the union assumes a heavy responsibility to exercise its control on behalf of, rather than against the individual employee. The collective agreement creates rights in the individual employee which are enforceable under section 301. In the absence of a union controlled grievance procedure the individual can sue and enforce his rights in his own behalf. The effect of the contractual provision giving the union exclusive control over the grievance procedure is to deprive the individual of his ability to enforce the contract on his own behalf. The union, having deprived the individual of his ability to enforce his rights, has a special obligation to act on his behalf.

Summers, *The Individual Employees' Rights Under The Collective Agreement: What Constitutes Fair Representation?* 126 U. PA. L. REV. 251, 256 (1977) (footnote omitted).

their seniority status. Upholding the grievances necessarily derogates the seniority of other employees. *Butler v. Local Union 823, International Brotherhood of Teamsters,* 514 F.2d 442, 445 (8th Cir.), *cert. denied,* 423 U.S. 924 (1975). In that situation the union must fairly represent both groups of employees and may take a position in favor of one group only on the basis of an informed, reasoned judgment regarding the merits of the claims in terms of the language of the collective bargaining agreement.[9] *See Humphrey v. Moore,* 375 U.S. 335

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9. It is obvious that mere discrimination between employees by the union cannot be the basis for a claim of unfair representation. Employees are not all similarly situated and a union needs to make many legitimate differentiations in order to represent them. It is equally apparent that a union and every employee it represents will not always agree upon the lines drawn and the perceived legitimate needs and rights of one group as opposed to another. In order to preclude imposing liability on a union because of mere differences of opinion or an error in judgment this court has frequently stressed the importance of improper motivation or bad faith in finding that a union's discrimination constitutes a breach of the duty of fair representation. *Mavis v. Brotherhood of Railway, Airline and Steamship Clerks,* 585 F.2d 926, 930-31 (8th Cir. 1978) (union decision "based upon a pragmatic assessment of the likelihood of success"); *Florey v. Air Line Pilots Association,* 575 F.2d 673, 676 (8th Cir. 1978) (no allegation of bad faith or arbitrary conduct); *Augspurger v. Brotherhood of Locomotive Engineers,* 510 F.2d 853, 859 (8th Cir. 1975) (unsupported conclusory allegations without factual inference of bad faith or discriminatory intent insufficient to invoke fair representation exception to doctrine of primary jurisdiction in ICC). In the situation of a direct conflict between employees, a union's decision to support a particular position must be made in good faith and not arbitrarily. This would seem generally to require an informed, reasoned judgment regarding the merits of the claim.

(1964); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1015 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *Price v. International Brotherhood of Teamsters*, 457 F.2d 605, 611 (3d Cir. 1972).

This duty fairly to represent all employees is not diminished because plaintiffs' rights were created by Hussmann. The particular provision of the collective bargaining agreement at issue provided that employees with superior skill and ability were entitled to promotion over those with greater seniority only if the company elected to assert its right to promote on the basis of skill and ability. This provision, typically referred to as a "modified seniority clause," controlled the promotion machinery. The company asserted its right to choose on the basis of skill and ability because of the belief that the position of maintenance pipefitter required greater expertise than most positions within the company. It is significant that no openings in this classification had occurred for over thirteen years; thus the company did not have any established past practices for promotions into this classification with which the union could challenge compliance. Hussmann had a right to choose on the basis of skill and ability, and by its exercise of this right it vested plaintiffs with rights under the collective bargaining agreement to hold the positions to which they were promoted.[10] The collective bargaining agreement clearly provided that employees promoted by the com-

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10. Hussmann's promotion of the junior employees on the basis of substantially superior skill and ability vested them with rights as third party beneficiaries of the collective bargaining agreement. Thus the company was bound to respect these rights and follow the terms of the collective bargaining agreement in the event it desired to remove the employees from the classification.

pany on the basis of superior skill and ability are entitled to hold their promotions even against challenges by employees with greater seniority. Thus, plaintiffs possessed rights under the collective bargaining agreement which the union had a fiduciary duty to protect.[11] The fact that their rights were contingent upon selection by the company became irrelevant once that contingency was resolved. The condition of selection is no different from the condition that plaintiffs possess superior skill and ability, which was the condition necessarily challenged by the grievants.

The nature of the union's duty in a dispute among employees is not changed by the company's taking a position in the grievance procedure. Even though a company may take a position favorable to a particular group of employees, the union may not abandon that particular group to the representation as afforded by the company favoring them. *See Deboles v. Trans World Airlines, Inc.,* 552 F.2d 1005 (3d Cir.), *cert. denied,* 434 U.S. 837 (1977); *Price v. International Brotherhood of Teamsters,* 457 F.2d 605 (3d Cir. 1972). The union is the agent of all employees in the unit and owes a fiduciary duty to represent their interests and rights under the collective bargaining agreement. Here the union not only

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11. Because by the terms of the collective bargaining agreement only the company had the power to vest employees with a right to a promotion, the union obviously owed no duty to represent employees other than those selected by the company and those with greater seniority than the employees selected. No other employees could possibly have any rights to the promotions under the collective bargaining agreement. *Local Union 1357, International Brotherhood of Electrical Workers, AFL v. Mutual Telephone Company,* 23 Lab. Cas. ¶ 67,634 at 83,792 (Sup. Ct. Hawaii 1952.)

abandoned the plaintiffs but took an adversary attitude toward them regarding the positions they had received by reason of the company's opinion of their skill and ability. The union took the position that any representation of plaintiffs would be made by the company, while the company declared that it had no duty to represent plaintiffs and properly protected only its self-interest which may or may not have corresponded to the interests of plaintiffs.

The first aspect of the union's conduct in processing the grievances challenging plaintiffs' promotions that indicates possible substandard representation of plaintiffs' interests is the union's strict adherence to the principle of seniority. The union argues that in processing the grievances it merely followed a policy of favoring employees with the greatest seniority, and that this cannot be a ground for finding a breach of the duty of fair representation because it was merely in good faith applying a neutral principle. Since we agree with the District Court's finding that there is no evidence that personal hostility toward plaintiffs motivated the use of this policy, we are squarely presented with the issue of whether this course of action combined with the other elements of the union's conduct toward plaintiffs could be found "so unreasonable and arbitrary as to constitute a violation of the duty of fair representation." *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 469 F.2d 181 (4th Cir. 1972).

The union's choice to process all grievances based on seniority discriminated against employees receiving promotions on the basis of merit. This conduct may be viewed as a perfunctory dismissal of the interests and

rights of plaintiffs. The union simply failed to represent them in any way. The modified seniority clause specifically required balancing the interests of merit and seniority whenever Hussmann deemed that the position warranted selection on the basis of merit. Under the collective bargaining agreement, after the company chose to select on the basis of merit, three separate considerations were relevant in determining the right of any employee to be promoted. These were (1) his selection by the company, (2) on the basis of skill and ability, (3) superior to the skill and ability of any senior employee who had bid for the position. Disregard for the qualification of superior skill and ability could manifest an arbitrary and perfunctory approach to promotion interests, as could ignoring the qualification of seniority or selection by the company. *See Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 469 F.2d 181, 183 (4th Cir. 1972); *De Arroyo v. Sindicato de Trabajadores Packing House, AFL-CIO,* 425 F.2d 281, 284 (1st Cir.), *cert. denied sub nom. Puerto Rico Telephone Co. v. De Arroyo,* 400 U.S. 877 (1970).

As one commentator, after reviewing the applicable cases, concluded:

> When the union's effort to represent a member of the collective bargaining unit falls below the level at which the court can conclude that the union has made a conscious, earnest effort to represent him, liability should flow. Upon a claim of substandard treatment, the union should be required to come forward with evidence to show why it followed the course of representation that it did. If the union's behavior is based on a conscious assessment of fair-

> ly competing values, it should be given broad discretion in its choice of representation tactics. But the union should not be allowed to plead, in effect, that it chose the easier path because of convenience or rigid adherence to "union policy."

Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights,* 51 Tex. L. Rev. 1037, 1102 (1973).

In this case the union has taken the position that "a union's freedom to follow seniority in job disputes cannot coexist with a duty to evaluate the comparative skills of competing employees." It initially selected which grievances it would process solely on the basis of seniority. It never inquired of plaintiffs about their experience or other qualifications. The only evidence presented to indicate any concern on the part of the union about the relative skill and ability of plaintiffs was the testimony of the union's international representative who stated that he had reviewed the reports of foreman Schwartz regarding his selection of plaintiffs. In contrast to this superficial review of plaintiffs, the union representative personally discussed the backgrounds, experience, and other qualifications of the senior grievants with them and invited them to testify at the first arbitration hearing.

While we do not suggest that a union must hold internal hearings to investigate the merits of every grievance brought to it, in certain situations it may be inappropriate for a union to tie its own hands by blind adherence to a policy of favoring employees with seniority in order to avoid disputes between employees. "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these

cases would surely weaken the collective bargaining and grievance processes." *Humphrey v. Moore, supra,* 375 U.S. at 349-50. The need for a union fairly to evaluate the merits of grievances has been recognized repeatedly. "In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances." *Vaca v. Sipes, supra,* 386 U.S. at 194. *See Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 558 (1976); *Foust v. International Brotherhood of Electrical Workers,* 572 F.2d 710, 715-16 (10th Cir. 1978), *rev'd in part on other grounds* ..... U.S. ....., 99 S. Ct. 2121, 60 L.Ed. 2d 698 (1979); *Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 531 F.2d 850, 853-54 (8th Cir. 1975); *Ruzicka v. General Motors Corp.,* 523 F.2d 912 (6th Cir. 1975). In particular, this court has recognized that certain circumstances compel a union to evaluate the individual capabilities of employees. *Petersen v. Rath Packing Co.,* 461 F.2d 312, 316 (8th Cir. 1972). In the context of this case the jury may have concluded that the union failed to take adequate measures to insure a fair resolution of the dispute created by the union's processing of the grievances of the senior employees.

By negotiating the modified seniority clause to control promotion decisions, the union has limited management in an area regarded by management as one of its most important prerogatives. This limitation on management has shifted some of the burden for making promotions onto the union. Responsible union participation can ensure that the use of the seniority criterion in these decisions is compatible with efficiency and em-

ployee morale. Union involvement that is not characterized by care and thoughtful preplanning can lead to subversion of the collective bargaining agreement by processing baseless grievances. S. H. SLICHTER, J. J. HEALY & E. R. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 178-210 (1960). *See also Humphrey v. Moore, supra,* 375 U.S. at 349-50. A policy of processing all grievances based on seniority regardless of their merit may even significantly alter the negotiated contract by chilling the exercise of the prerogative to promote on the basis of merit. Since a business runs on a cost-benefit basis, the cost of arbitrating the grievances of all senior employees may at times be greater than the benefit of advancing the most skilled worker. Adherence to the union's policy in this situation would effectively set aside a provision of the collective bargaining agreement.[12] "Such a cavalier treatment of the contract is scarcely consistent with the contemplation of the parties and seems contrary to the union members' understanding and expectations when they ratified the contract." Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?* 126 U. Pa. L. Rev. 251, 264 (1977). *See also Vaca v. Sipes, supra,* 386 U.S. at 191-92; *Humphrey v. Moore, supra,* 375 U.S. at 349-50.

The jury could also have found evidence of a breach of the duty of fair representation on the basis that the

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12. As stated by the Third Circuit in *Bazarte v. United Transportation Union,* 429 F.2d 868, 872 (3d Cir. 1970); "The union has an obligation in exercising its power as bargaining agent to act fairly under the collective bargaining agreement and not to assert or press grievances which it believes in good faith do not warrant such action."

union failed to notify plaintiffs of the arbitration hearing or invite them to attend. Regardless of the initial evaluation of the grievances, it is obvious that once a union has chosen to arbitrate a dispute adequate presentation of all employee claims is necessary to ensure fairness in the arbitration.[13] *See* Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 Tex. L. Rev. 1119, 1169 (1979). Since a union's failure to inform an employee whose interests are before an arbitrator of the arbitration hearing is not necessarily sufficient to support a claim of unfair representation, courts have carefully searched the records for prejudice to the employee. When the position of the employee has been adequately presented, no breach has been found. *Cf. King v. Space Carriers, Inc.,* No. 78-1873, slip. op. at 11-12 (8th Cir. October 16, 1979). For example, in *Humphrey v. Moore,* 375 U.S. 334 (1964), a joint committee decided to dovetail the seniority lists of two merging companies. The Supreme Court, holding that the union was entitled to take a position in the dispute between employees, carefully noted that the disfavored employees had been given notice of the hearing and that three stewards representing them were present at the hearing and given every opportunity to state their position. *Humphrey v. Moore, supra,* 375 U.S. at 350-51. *See also*

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13. As a corrolary it should be noted that a completely fair arbitration of a dispute would necessarily insulate a union from any alleged breaches of its duty of fair representation because the allegedly aggrieved employee could not have suffered any injury from the union's conduct. If an employee's position is changed as a result of a fair arbitration, the union cannot be found to have caused the change. Only if the arbitration is tainted in some manner by the union's conduct can the result of an arbitration be attributable to the union.

Ramsey v. NLRB, 327 F.2d 784, 788 (7th Cir.), *cert. denied,* 377 U.S. 1003 (1964); *Bernard v. McLean Trucking Co.,* 429 F. Supp. 284, 286-87 (D. Kan. 1977); *Siskey v. General Teamsters, Chauffers, Warehousemen & Helpers, Local No. 261,* 419 F. Supp. 48, 53 (W.D. Pa. 1976); *DeBelsey v. Chemical Leaman Tank Lines,* 368 F. Supp. 1159, 1163 (E.D. Pa. 1973); *Davidson v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 1189,* 332 F. Supp. 375, 378-79 (D.N.J. 1971). However, when the employee is prejudiced by not having notice of the hearing because the union inadequately prepared or presented his or her interests, a breach of the duty of fair representation has been demonstrated. *Bond v. Local Union 823, International Brotherhood of Teamsters,* 521 F.2d 5, 9 (8th Cir. 1975); *Thompson v. International Association of Machinists,* 258 F. Supp. 235, 239 (E.D. Va. 1966).

The union claims that plaintiffs could not have been deprived of a fair hearing because Hussmann fully and adequately defended their position. The company, however, has consistently taken the position that it had no duty to represent plaintiffs. At trial, Hussmann presented evidence that even plaintiffs did not expect it to represent their interests. Furthermore, regardless of whether plaintiffs were inadequately represented at the first arbitration hearing, the evidence is clear that no one asserted their interests at the time of resubmission to the arbitrator.

The union also appears to contend that specific representation of plaintiffs was unnecessary since the only evidence of plaintiffs' skills and abilities cognizable at the hearing was as they were known by the company

foreman, Schwartz, who had selected plaintiffs. The union asserts that this obviated any need for plaintiffs to testify before the arbitrator. The facts belie this argument. Although at the first arbitration hearing Schwartz testified as to his evaluation and knowledge of the skill and abilities of both plaintiffs and the grievants, the union requested the grievants to attend and testify as to their abilities and work experience. This *ex parte* presentation by the union may well have hindered plaintiffs' effort to secure an objective consideration of their promotions on the basis of superior skill and ability because the arbitrator's decision appears to rely heavily upon the testimony of the grievants relating their background experience in terms of work they performed outside the plant. The arbitrator clearly viewed this experience as determinative in his decision regarding relative skill and ability. Although the company had some knowledge of plaintiffs' outside work, more work experience, while in a sense cumulative, could indicate greater skill and ability. Since the grievants appeared to have experience not related to the arbitrator by the company representative who interviewed them, it can be inferred that plaintiffs would also be able to relate their outside work experience better than the company representative. Thus, the failure to invite plaintiffs to attend the arbitration hearing may have left them inadequately represented regarding a crucial factor in dispute.

The fairness of the ultimate arbitration award also necessarily involved consideration of the union's and company's resubmission to the arbitrator of the initial decision. The jury could have found that the resubmission constituted a breach of the duty of fair representation and breach of the collective bargaining agreement's

provision providing that arbitration is a final and binding resolution of a dispute.[14] It was undisputed that at the second hearing no additional testimony was taken. Only representatives of Hussmann and the union met with the arbitrator, presented him with the correct seniority dates and bid sheets, and requested him to clarify which four employees should be awarded the four positions that had opened. Some testimony, however, indicated that the parties meeting with the arbitrator also told him, pursuant to a previous agreement, specifically which four employees should receive the positions. In this context, the jury was presented with the issue of whether the second hearing resulted in a substantial change from the original decision or merely a "clarification" of it. If an agreement between the union and the company substantially altered the award by taking away plaintiffs' rights granted by arbitration, defendants could have been found to have violated the "final and binding" provision of the collective bargaining agreement.

By the first decision of the arbitrator, six employees were granted the maintenance pipefitter classification. Seniority was designated in the following order: Dattilo, Pasley, Smith, Krassinger, Watson, Serini. According to the supplemental decision, only Dattilo, Watson, Krassinger, and Pasley were granted the classification, with their seniority realigned in the order listed. It was understood at the time of both decisions that only four actual openings in the classification would be filled.

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14. Article 7, Section 1 of the collective bargaining agreement, outlining the grievance procedure, provides in relevant part:

> The majority decision of the arbitration board shall be final and binding upon the parties. * * *

While defendants argue that this changed result must be viewed as a clarification because the first award could not be implemented, the record reveals substantial support for the position of plaintiffs that there would be no problem with permitting an employee to hold a classification status even though he did not currently work within it. Plaintiffs' position appears to have been the company's initial response and consistent with some past practice. Additionally, it should be noted that in his original decision the arbitrator specifically found that Pasley possessed substantially greater skill and ability than Krassinger, yet in the supplemental decision Pasley's seniority was demoted to below that of Krassinger.

The last element of the union's conduct toward plaintiffs that may indicate unfair representation is the failure to accept and process plaintiffs' grievances or to place the matter on the agenda of a regular union meeting. After the revision of the arbitration decision pursuant to the second hearing, plaintiffs filed grievances challenging the award. The union simply refused to accept the grievances. Plaintiffs complained to union officials regarding what they perceived as unfair treatment and requested permission to speak to the union membership to discuss their treatment. They mailed grievance forms directly to Hussmann, but it returned them because they were not signed by the union and, therefore, could not be processed under the terms of the collective bargaining agreement. The union defends its conduct by stating that it denied the grievances on the basis that the final and binding clause of the collective bargaining agreement prohibited processing them and that it did report the results of the arbitration at a regular union meeting. Although a union clearly has

the authority to deny grievances based upon a good faith evaluation, *Humphrey v. Moore,* 375 U.S. 335 (1965), in view of the overall conduct of defendants the jury may have perceived the conclusion of the union regarding the effect of the final and binding clause as unreasonable and not made in good faith. The original award had been resubmitted to the arbitrator despite the final and binding clause. The plaintiffs had not been fully represented at the arbitration hearings. Also, plaintiffs presented some evidence that one of the successful grievants, Dattilo, who had then been a union official, had falsified his testimony at the first arbitration hearing.

This case involved a complex course of conduct on the part of defendants and the evidence interrelates and is susceptible of different reasonable inferences. In a fair exercise of judgment, reasonable persons could have concluded that defendants breached the collective bargaining agreement and the union breached its duty to represent plaintiffs fairly.

V.

On appeal, plaintiff Pasley claims that the District Court clearly erred by removing Pasley's claim of race discrimination from consideration of the jury and by holding that the evidence failed to establish that defendants violated his rights on account of his race. We find these contentions to be without merit and affirm the District Court on the basis of its well-reasoned memorandum opinion. Plaintiff Pasley failed to establish that any action taken by defendants was the result of race discrimination. The evidence revealed that both the company and the union treated Pasley in exactly the

same manner as they treated the other plaintiffs, who are white. The only difference related to the Pogue grievance, which was arbitrated against Pasley although the employee had filed it against Serini. Although this, along with the rest of the union's conduct toward Pasley, can be explained on the basis of his relative seniority status, it also could not possibly be the basis of a damage claim since the grievance was denied at arbitration and Pasley retained his position. In this context, Pasley's controverted testimony that a union official had stated in a joking manner that Pasley's position was being challenged because of his race cannot be the basis for a claim of race discrimination under 42 U.S.C. §§ 1981 and 1985.

The removal of this claim from the jury cannot be grounds for reversal since plaintiff Pasley did not present sufficient evidence to support a jury verdict in his favor.[15] *See Hays v. Consolidated Service Corp.*, 517 F.2d 564, 565-66 (1st Cir. 1975); *Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, 531 F.2d 850, 853 (8th Cir. 1975); *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728, 731 (10th Cir.), *cert. denied*, 389 U.S. 857 (1967); *Freeman Contractors, Inc. v. Central Surety and Insurance Corp.*, 205 F.2d 607, 612 (8th Cir. 1953).

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15. We find it unnecessary to decide whether the requested remedy of reinstatement of seniority classification plus back pay should be characterized in this situation as a request for purely equitable relief. If his claim were purely equitable, plaintiff Pasley might not be entitled to a jury trial. *See Lynch v. Pan American World Airways, Inc.*, 475 F.2d 764, 765 (5th Cir. 1973).

VI.

Both Hussmann and the union assert that in the event that the judgment notwithstanding the verdict on Count I is reversed, errors in the trial stage warrant remanding for a new trial.

First, the union argues that plaintiffs had no right to a jury trial, although it candidly concedes that the law in this circuit is contrary to its position. *Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 531 F.2d 850 (8th Cir. 1975), explicitly held that plaintiffs charging a breach of the duty of fair representation are entitled to a jury trial. In view of the union's failure to show any error in the analysis made in *Minnis,* we decline to overrule its holding.

The union also alleges that the jury was improperly instructed concerning the duty of fair representation. Part of the instructions seemed to indicate that a verdict could be entered against the union merely upon a finding that by not processing plaintiffs' grievances the union had violated a provision of the collective bargaining agreement. As the union, however, acknowledges, this instruction must be read in the context of the charge as a whole, *Simpson v. Norwesco, Inc.,* 583 F.2d 1007, 1013 (8th Cir. 1978); *Fields v. Chicago, Rock Island and Pacific Railroad Co.,* 532 F.2d 1211, 1213 (8th Cir. 1976); *Alabama Great Southern Railway Co. v. Chicago & Northwestern Railway Co.,* 493 F.2d 979, 986 (8th Cir. 1974); *Jiffy Markets, Inc. v. Vogel,* 340 F.2d 495, 500 (8th Cir. 1965). Directly after the allegedly erroneous instruction, the court instructed:

> The union's right to consider grievances of its members and to make good faith decisions relative

thereto carries with it a broad discretion. That discretion means that the union's decision should not be disturbed so long as it was made honestly and in good faith. This is true even if you were to believe that the union was in error.

* * * *

If and only if you of the jury find that United Steelworkers of America, Local 13889, breached its legal duty of fair representation * * * may you return a verdict for any of the plaintiffs and against either or both of the defendants.

A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. In order to make out such a claim of arbitrary, discriminatory or bad faith conduct there must be substantial evidence of fraud, deceitful action or dishonest conduct; this involves more than errors in judgment. Simply stated, of necessity a wide range of reasonableness must be allowed a bargaining representative in serving the employees it represents and, as a result there is no basis for second-guessing the decisions of that representative in handling a grievance absent the requisite substantial evidence of arbitrary, discriminatory or bad faith conduct. If and only if you, the jury find substantial evidence of fraud, deceitful action or dishonest conduct may you conclude that United Steelworkers of America, Local 13889 breached its duty of fair representation.

We find that this instruction clarifies that mere error on the part of a union is not sufficient to establish

a breach of the duty of fair representation. Furthermore, we note that this instruction was overly generous to the union. Fraud or bad faith is not necessary to charge unfair representation if the union's conduct is otherwise arbitrary or perfunctory, *Vaca v. Sipes, supra,* 386 U.S. at 177; *Ethier v. United States Postal Service,* 590 F.2d 733, 737 n.3 (8th Cir. 1979); *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 469 F.2d 181, 183 4th Cir. 1972), nor must a jury necessarily find substantial evidence of fraud, deceitful action or dishonest conduct to conclude that a union breached its duty of fair representation.[16] *See Foust v. International Brotherhood of Electrical Workers,* 572 F.2d 710, 714-15 (10th Cir. 1978), *rev'd in part on other grounds,* ..... U.S. ....., 99 S.Ct. 2121, 60 L.Ed. 2d 698 (1979).

Hussmann challenges the trial court's instructions to the jury relating to the resubmission of the initial arbitration award to the arbitrator. One instruction permitted the jury to enter a verdict against both defendants if it found that the resubmission violated the "final and binding" clause of the collective bargaining agreement. The other challenged instruction directed a verdict against defendants if the jury found an agreement before the resubmission between the union and Hussmann regarding the four men who should hold the classifications a breach of the union's duty of fair representation, and a breach of the collective bargaining agree-

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16. In *Butler v. Local Union 823, International Brotherhood of Teamsters,* 514 F.2d 442, 453 (8th Cir.), *cert. denied,* 423 U.S. 925 (1975), we approved jury instructions defining the union's duty as "a legal duty fairly to represent the plaintiff without arbitrariness, discrimination, or bad faith * * *."

ment. Hussmann claims that these instructions were erroneous and prejudicial because they assumed the existence of a disputed fact and misstated the legal effect of the "final and binding" provision of the collective bargaining agreement. We disagree. The instructions explicitly provided that the jury must find breaches of both the collective bargaining agreement and the duty of fair representation and whether the resubmission to the arbitrator constituted these breaches was properly placed in the province of the jury. The jury instructions must be read as a whole, especially in the situation where the jury is presented with the case as a whole and does not make particularized determinations, but rather decides the entire case by a simple verdict assessing damages. The function of an appellate court is not to reconstruct the mental processes of the jurors, but to uphold a jury verdict if it has received proper instructions and reasonable inferences from the properly admitted evidence support its findings.

The union also asserts that the District Court erred when it excluded evidence of the NLRB's failure to issue a complaint after plaintiffs filed unfair labor practice charges. A trial court has wide discretion in ruling on the admissibility of evidence. *Simpson v. Norwesco, Inc.*, 583 F.2d 1007, 1013 (8th Cir. 1978); *General Insurance Co. of America v. Hercules Construction Co.*, 385 F.2d 13, 24 (8th Cir. 1967). The Federal Rule of Evidence, Rule 403, permits exclusion of evidence if the court determines that "its probative value is substantially outweighed by the danger of unfair prejudice." On balance, we do not think the decision to exclude the evidence of the NLRB's failure to issue a complaint was an abuse of discretion. The possibility of jury confusion and poten-

tial misunderstanding as to the weight to be accorded this evidence presented a danger of unfair prejudice to plaintiffs and the probative value of the evidence was not overwhelming. The NLRB general counsel has unreviewable discretion to refuse to issue an unfair labor practice complaint, and plaintiffs were not afforded a hearing before the NLRB. Furthermore the courts, not the Board, have the responsibility for defining the scope of the duty of fair representation. *See Vaca v. Sipes, supra,* 386 U.S. at 180-83.

Hussmann also argues for a new trial on the basis that the jury's determination of damages, of $6500 in favor of Smith and $2500 in favor of Pasley, indicates that it was confused or impassioned and inflamed because these amounts are in excess of the only tangible evidence of damages in the record, the amount of back pay lost by Smith and Pasley prior to the time of trial. The evidence, however, adequately supports the verdict. In determining the amount of damages, the jury was entitled to take into account the continuing nature of the injury sustained by plaintiffs. Plaintiff Smith lost his classification as maintenance pipefitter, and plaintiff Pasley suffered a demotion of his seniority status within the classification. From the direct evidence of compensation already lost, the jury could compute the reasonably foreseeable future losses attributable to the injury. *Cf. Richardson v. Communications Workers,* 486 F.2d 801, 806 (8th Cir. 1973). There is no indication that the amount awarded reflects damages for mental distress, imposition of which the circumstances of this case do not warrant. *See Richardson v. Communications Workers,* 443 F.2d 974, 982-85 (8th Cir. 1971). The jury was not instructed to consider punitive damages, and the

award merely compensates for injuries caused by the violations of plaintiffs' rights as found by the jury.

VI.

Plaintiffs contend that they are entitled to the damages awarded by the jury and to a judgment in accord with the advice of the jury, in response to special interrogatories, in favor of restoring plaintiffs' seniorities and classifications to their positions before the union processed grievances against them. The trial court rejected the jury's advisory recommendation at the same time it granted defendants' motions for judgment notwithstanding the verdict. In view of our holding upon appeal, we find that the District Court should have the opportunity to reconsider the advisability of implementing the jury's recommendation. In any event, the District Court is at liberty to accept or reject the advisory findings related to equitable relief. *Chicago & North Western Railway Co. v. Minnesota Transfer Railway Co.*, 371 F.2d 129, 130 (8th Cir. 1967).

VII.

The judgment of the District Court is affirmed in part, vacated in part, and modified as set forth herein. The case is remanded to the District Court for entry of a judgment consistent with this opinion.

Costs assessed in favor of plaintiffs.

LAY, Circuit Judge, Concurring.

I concur in the result reached by Judge Gibson. I do so on the narrow ground that the agreement by the company and the Union to go back to the arbitrator and to rearbitrate the preference of the plaintiffs was not disclosed to the plaintiffs. This was presented to the arbitrator without any notice whatsoever to the plaintiffs and without anyone representing their rights. I think this is the only evidence of bad faith in this record. Compare *Buchholtz v. Swift & Company,* Lay dissenting, No. 78-1559 et al., September 7, 1979, p. 15.

BRIGHT and ROSS, Circuit Judges, Concurring.

We concur in the result reached by Judge Gibson in his opinion and concur with all of the reasoning advanced in that opinion except that portion relating to the failure of the union to properly represent the plaintiffs in the first arbitration hearing. In our judgment, the plaintiffs were adequately represented by management in that first hearing, although a jury could find that the union was derelict in not giving the plaintiffs adequate notice of the time, place and nature of the hearing.

As we view the case, the principal breach of the union's duty to represent the plaintiffs took place after the first arbitration hearing. At that time, the record indicates there was sufficient evidence of an agreement between the company and the union to go back to the arbitrator and arbitrarily rearrange the order of preference among the plaintiffs and the other more senior employees. This new agreement was not disclosed to the plaintiffs, was presented to the arbitrator without any notice whatsoever to the plaintiffs and without anyone

representing their rights. It represented a complete abandonment of the plaintiffs and of the original position of the company by company officials without giving any reason therefor. We thus feel that there was sufficient evidence in the record to show that the union failed to act in good faith and that the company breached its collective bargaining agreement. Therefore, the jury verdict should be allowed to stand.

HEANEY, Circuit Judge, dissenting, with STEPHENSON, Circuit Judge, concurring.

We respectfully dissent with respect to those sections of the majority opinion which deal with the Union's duty of unfair representation. In our view, the majority opinion is inconsistent with prior opinions of this Court and the Supreme Court.[1] It substantially undercuts the Union's right to process grievances of senior employees who complain that junior employees have

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1. In *Mavis v. Brotherhood of Rwy., Airline & S. S. Clerks,* 585 F.2d 926 (8th Cir. 1978); *Florey v. Air Line Pilots Ass'n, Intern.,* 575 F.2d 673 (8th Cir. 1978); and *Augspurger v. Brotherhood of Locomotive Engineers,* 510 F.2d 853 (8th Cir. 1975), we held that improper motivation is the crux of the fair representation doctrine and is an essential element in fair representation actions. In *Ethier v. United States Postal Service,* 590 F.2d 734 (8th Cir. 1979), we noted in dicta that a breach of duty to fairly represent may also be found where the representation was perfunctory (without concern or with indifference), and in *Minnis v. Intern. U., United Auto.,* 531 F.2d 850 (8th Cir. 1975), we held that failure to inform an employee that a grievance would not be taken to arbitration until it was too late for the employee to take any action himself was a violation of the duty. We have never suggested that a union cannot choose between competing values if it chooses to do so without hostility or improper motivation.

been promoted to jobs for which the senior employees are equally well qualified.

The collective bargaining agreement between the Union and Hussmann Refrigerator Company provides as follows:

ARTICLE 9
Seniority

SECTION 1. The Company recognizes the principle of classification seniority and seniority based upon the total length of continuous service with the Company.

Seniority shall be by job classifications, unless otherwise specified below.

Seniority, skill and ability to perform the work required shall be considered by the Company in making promotions, transfers, layoffs and callbacks. Where skill and ability to perform are substantially equal, seniority shall govern. * * *

* * * *

[ARTICLE 10]

SECTION 2. Ability and required performance of an employee on the job shall be factors considered for promotion. When such factors are substantially equal between those being considered, seniority shall govern. * * *

* * * *

SECTION 3. When an employee is appointed to a new position or vacancy under the provisions of this article and it develops within a reasonable length of time that the employee is not capable of

handling the position, he shall be entitled to return to his former position with full seniority accrued. Should a vacancy of like nature again present itself after a period of ninety (90) calendar days, he shall be allowed the privilege of again making application.

The Company processes approximately 35,000 bids annually. From these bids, about 2,000 jobs are awarded. The Company's practice is to waive skill and ability with respect to most jobs. No objection to this practice has been made. When vacancies arose in the maintenance pipefitter classification, the Company asked for bids and numerous employees responded. The Company interviewed the employees and selected plaintiffs Smith and Pasley on the basis of what was judged to be their superior skill and ability over at least four other men who had more seniority. The four filed a grievance with the Union, contending that they had skill and ability substantially equal to that of the men selected, and that the Company had violated the contract by its action.

The grievances were processed through the first three steps of the grievance procedure by personnel of the local union. At each step, the Company took the position that the employees it selected had superior skills and ability. The Union argued that the grievants' skills and ability were substantially equal to that of Pasley and Smith, and that each had greater seniority. At the fourth step, an International representative with experience both as a pipefitter and in handling grievances was requested to take over the matter. The Company furnished him all relevant information in its possession with respect to the plaintiffs and the grievants.

After reviewing the information, he decided to process the grievances to the fourth step. The Company adhered to its original position.

The representative then asked that the grievances be submitted to arbitration. An arbitrator was appointed. At the proceeding, the Company's maintenance foreman, who made the initial selection, testified at length as to the skill and ability of each person selected. He supported his testimony with documentary evidence. The grievants each testified as to their skill and ability, and the representative handling the grievance supported their testimony with documentary evidence. Pasley and Smith knew that the arbitration hearing was to take place, but neither requested an opportunity to be present and neither appeared at the arbitration hearing.

The arbitrator considered the matter carefully. He determined that two of the grievants had skills and ability substantially equal to those of Pasley and Smith and that two others did not. We quote his opinion at length as it is indicative of the thoroughness of the hearing and the decisionmaking process.

> The seniority and promotion clauses, both in Article 9 and Article 10 of the Contract between the parties, express what is usually referred to as a "modified seniority clause." That is, under the terms of the Contract seniority is to prevail only when the other factors of ability and required performance of an employee on the job are substantially equal between those being considered. * * *
>
> Certainly the existence of the disqualification clause in Section 3 of Article 10 indicates that trial periods are contemplated by the parties and the

Company is not bound by the promotion of an incapable employee. Certainly the existence of a rate progression in the pipe fitter classification indicates some on-the-job learning is contemplated after promotion to that classification before the applicant will possess all of the skills of a competent maintenance pipe fitter. While the implication of these latter two provisions is indicative that some liberality should be indulged in by the intent of the parties by making promotions, where possible, within the plant and by seniority, their existence does not annul the clear provisions of Article 10, Section 2, and Article 9, Section 1, which provide that ability and the required performance on the job are to be the governing factors, and seniority is to prevail only when these factors are substantially equal. These provisions clearly grant to the Company the right to consider ability and to promote a junior employee over a senior one, where the junior is significantly more qualified.

* * * *

[T]he ultimate inquiry must be whether or not the Grievants possessed ability for the required performance of a pipe fitter substantially equal to the successful bidders. If they did, the Company must be regarded as having violated their seniority rights for having failed to select them. If they did not, the Company did not violate the contract.

* * * *

[T]he evidence shows that Grievant Dattilo did possess the qualifications for the Maintenance Pipe Fitter Job, according to Foreman Schwartz, al-

though Schwartz considered Paisley [sic] more qualified. Although Schwartz, in Dattilo's case, did not give particular consideration to the fact that Dattilo had been a refrigeration mechanic and general maintenance man, in the case of the successful bidders Smith and Serini he did consider this because it reflected an ability to braze and do other tasks. It is also significant that he felt that Smith and Serini's background with refrigeration and air-conditioning was significant, and that Mr. Dattilo had some ninety hours of formal training in these fields. While Mr. Paisley [sic] had substantial general background in plumbing due to his work outside of the Company, Mr. Dattilo had also done, in addition to some home plumbing, some fitting in the Company as a general maintenance man, and was specifically familiar with the air system on the Randsberg Paint System within the Company. Mr. Schwartz' admission that the question between Dattilo and Paisley [sic] was very close is a strong indication that the factors of ability and required performance were substantially equal. The bare fact that Paisley [sic] may have been more qualified did not entitle the Company to disregard Dattilo's seniority, if the difference in qualification was not substantial. Under the terms of the contract seniority is to govern if the ability is substantially equal. Thus to disregard seniority the differential in qualifications must be significant. Since the differential in qualifications was acknowledged to be very close, it must be regarded that Dattilo and Paisley [sic] were substantially equal in qualifications even though Paisley [sic] may have been the more qualified of the two.

It must be further noted that although the evidence phrased the relative qualifications of Dattilo against Paisley [sic], Dattilo had bid all four positions, had greater seniority than all of the successful bidders, and was, therefore entitled to be considered also in relation to Watson, Serini, and Smith, the other successful bidders. In comparison to those men, Mr. Dattilo's qualifications do not oppose ten years experience as an outside plumber, and whatever edge that gave Paisley [sic] is eliminated. Under these circumstances the admittedly close differential in qualifications between Paisley [sic] and Dattilo probably does not render their qualifications substantially unequal but, in any event, as compared to Watson, Serini, and Smith, this differential is reduced further. It follows that under the terms of the contract Dattilo enjoyed substantially equal qualifications and was entitled to be awarded the job of Maintenance Pipe Fitter.

* * * *

Mr. Krassinger had substantial plumbing experience, which the Company regarded as important in awarding the jobs to Paisley [sic] and Watson. This had been more than merely occasional home repair. Mr. Krassinger had, in fact, done the entire plumbing on his own home and done two others as a contractor, besides working for a plumbing contractor as a second job. Under the evidence this constitutes a very substantial amount of bid related work, and the evidence from Mr. Krassinger was that he was familiar with many of the aspects of the trade which Mr. Schwartz considered important with the other applicants, including copper tubing,

> soil pipe, sewer piping, and working with leaded joints. He also testified to some experience with air valves, soldering drains, and other like work. All of this constitutes substantial pipe fitter related ability. Mr. Krassinger also bid all postings and was entitled to be compared with all of the successful bidders. As the evidence was detailed, his abilities appear to be very comparable to Serini, over whom he has seniority, and, as the evidence was presented, I do find that the qualification factors were substantially equal between those two. Accordingly, Mr. Krassinger's seniority was entitled to consideration. While Mr. Krassinger also enjoyed seniority over Mr. Paisley [sic], I do find the the [sic] Company had grounds to find that Paisley [sic] had substantially greater ability and it follows that Mr. Krassinger would not have been entitled to have been a successful bidder until May 23rd when Serini was awarded the job.

Supplemental and Corrective Decision of Arbitrator, pp. 11-12, 14-18.

The plaintiffs were dissatisfied with the arbitration award and commenced this action. The District Court eventually held that the Union did not breach its duty to fairly represent the plaintiffs by processing the senior employees' grievances. A majority of this Court has now reversed that holding. It appears to hold that if a union is a party to a collective bargaining agreement containing a modified seniority clause, it cannot represent senior employees as against junior employees who have been tentatively selected by the Company for their skill and ability unless it first conducts an internal hearing or an intensive investigation to determine whether, in fact, the

senior employees' skill and ability is substantially equal to that of the junior employee.

The majority opinion appears to be partially based on a lack of appreciation of the principle of seniority. Seniority is deemed so important by employees that it is embodied, in one form or another, in virtually every collective bargaining agreement.[2] Seniority will probably always be a primary concern of unions[3] just as skill and ability will probably always be primary concerns of management.[4] The modified seniority rule represents an at-

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2. *See* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 Harv. L. Rev. 1532, 1534 (1962).

3. It is difficult to overstate the importance attached by the workers to union controls of this nature. The feeling of independence, the relief from insecurity attendant upon the rationalization of personnel policies can be appreciated only when contrasted with the feeling of subservience and the despised need for bootlicking of previous days. Nowhere is this truer than in the large corporation.

* * * *

To eliminate such favoritism and willfulness, the unions have sought and obtained a sharing of authority in the areas of concern. The seniority principle is its answer to situations such as that described above. To charges that seniority gives no heed to a man's ability or even his need, a union man will reply that at least it is objective. He knows where he stands. There is a rule, and a union to enforce it on his behalf.

Chamberlain, THE UNION CHALLENGE TO MANAGEMENT CONTROL 93-94 (1948).

4. In the collective bargaining process, the seniority factor is there at the insistence of the union, and it is management which insists on the protective flexibility of the equal ability requirement. It is a

tempt to reconcile the union's concern for seniority with management's concern for skill and ability by requiring that seniority prevail if skill and ability are substantially equal.[5] The ultimate decision in the case of a dispute is

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> management judgment that the junior employee has such superior ability that seniority may be ignored. The union is the defender of the seniority concept and can be expected to grieve in all promotion-by-pass cases except those in which the senior employee is clearly unqualified (and even a fair number of those situations get taken up). It is novel to assert that the union has a duty to make its own determination of the qualifications of the junior employee as a prerequisite to supporting the grievance of the passed-over senior. Further, it is unrealistic to consider the two employees as being on the same footing as far as the contract and the union's duty are concerned.

W. Murphy, *Due Process and Fair Representation in the Public Sector,* PROCEEDINGS OF THE THIRTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, BNA 139-140 (1977).

5. In *Butler v. Local U. 823, Int. Bro. of Teamsters,* 514 F.2d 442 (8th Cir), *cert. denied,* 423 U.S. 924 (1975), the operations of two plants of a corporation were consolidated into the newer of the two plants. The national agreement covering both plants provided that when two plants were consolidated in this fashion, seniority would be governed by the length of service with the company. Application of the rule would have resulted in almost all of the employees from the older, abandoned plant retaining their jobs and the employees of the newer plant being laid off. To avoid this result, the local union and management agreed to slot the employees according to relative seniority in each plant rather than straight company seniority. When the older employees of the abandoned plant filed grievances, the local union refused to process them. We held that the local union had violated its duty to represent the employes fairly because it had breached its duty to insist that the employer adhere to

given to the arbitrator. We should leave it there.[6]

The majority opinion effectively rewrites this and thousands of similar collective bargaining agreements. It places an intolerable burden on bargaining unit representatives. In every case where two or more persons bid for vacancies, a union will have no practical alternative but to hold an internal union hearing comporting with minimum due process standards to determine whether any of the senior employees who bid for the job have skills and abilities substantially equal to those of the junior employee awarded the position. No matter how a union decides this issue, however, the problem will not be resolved. If the senior employee loses before the union tribunal, he may well bring an action against the union for failure to fairly represent him. If the senior employee wins before the union tribunal, he will still have to proceed to arbitration. The new procedure will waste time, increase back pay awards and keep the unions in constant turmoil. The present procedure of processing apparently meritorious claims of senior employees not only comports with the specific language of

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the contract which resulted in discrimination against the senior employees. Thus, we recognized the agreement between the parties and insisted that it be upheld although a merger of the seniority list might have appeared equitable.

6. We have no right to overturn the arbitrator's decision since it clearly drew its essence from the collective bargaining agreement. *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960); *Kewanee Machinery v. Local U. No. 21, Intern. Bro.*, 593 F.2d 314 (8th Cir. 1979); *Local 4076, United Steelworkers v. United Steelworkers*, 338 F.Supp. 1154 (W.D. Pa. 1972).

the agreement but also protects the rights of members and insures industrial peace.[7]

The majority quotes from *Humphrey v. Moore,* 375 U.S. 335 (1964), in its opinion. The opinion does not, however, support the panel's decision. To the contrary, the view espoused by the panel is rejected.

> [W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. * * * "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." [*Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953.)] Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process,

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7. The Union's decision to process the grievances of the four senior employees was not based on a blind adherence to the seniority principle. The grievances were taken to arbitration only after a staff representative of the United Steelworkers International Union reviewed the work and experience records of the employees appointed to the job by the Company and the grievants. Nothing in the record supports the panel's contention that the Union takes every grievance of every senior employee who claims a job by seniority to arbitration.

so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination. After Dealers absorbed the Louisville business of E & L, there were fewer jobs at Dealers than there were Dealers and E & L drivers. One group or the other was going to suffer. If any E & L drivers were to be hired at Dealers either they or the Dealers drivers would not have the seniority which they had previously enjoyed. Inevitably the absorption would hurt someone. By choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors. The evidence shows no breach by the union of its duty of fair representation.

Id. at 349-350.

The majority also cites a number of cases for the proposition that the Union's decision to process the grievances of senior employees without first providing some type of hearing to the applicants manifested an arbitrary and perfunctory approach to handling the matter. We find them to be inapposite.

In *Griffin v. International U., United Automobile, A. & A. I. W.*, 469 F.2d 181 (4th Cir. 1972), a bargaining

agent was found to have breached its duty to fairly represent an employee discharged for fighting. Although the bargaining agent filed a grievance contesting the discharge with the supervisor involved in the fight, it subsequently refused to process the grievance because of friendship between the union president and the supervisor.

In *De Arroyo v. Sindicato de Trabajadores Packing., AFL-CIO,* 425 F.2d 281 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970), six employees were discharged when the plant was automated. They filed grievances contending that employees with less seniority had been retained on the payroll by the company. The bargaining agent was found to have breached its duty to represent the employees fairly by failing to investigate the employees' claim that junior employees had been retained on the job in preference to them.

In *Foust v. International Broth. of Elec. Workers,* 572 F.2d 710 (10th Cir. 1978), an employee was discharged for failure to report for duty at the expiration of a leave of absence. He asked his bargaining agent to file a grievance on his behalf. The bargaining agent failed to file a grievance within sixty days as required by the collective bargaining agreement, giving no reasonable excuse for failing to do so.

In *Minnis v. Intern. U., United Auto., Aerospace, Etc.,* 531 F.2d 850 (8th Cir. 1975), an employee was discharged for falsifying a medical form necessary to receive back pay. The bargaining agent processed the grievance through the first three steps of the process and then informed the company that it would not take the matter to arbitration. The bargaining agent was found to have violated its duty of fair representation

because it failed to inform the employee of its decision not to arbitrate the matter until six months after it had made the decision.

In *Ruzicka v. General Motors Corporation,* 523 F.2d 306 (6th Cir. 1975), an employee was discharged for intoxication. The bargaining agent processed his grievance through the first two stages of the grievance procedure, but inexplicably neglected to take the grievance through the third stage of the process. It failed to inform the employee that it was not going to continue with the matter. Again, the bargaining agent was found to have violated its duty to represent the employee fairly because of this failure.

A common thread runs through *De Arroyo, Foust, Minnis* and *Ruzicka.* In each case, the bargaining representative was grossly or inexplicably negligent in failing to process a grievance submitted to it by an employee without a sound reason for its decision. *Compare Ethier v. United States Postal Service,* 590 F.2d 734 (8th Cir. 1979). In *Griffin,* there were allegations of bad faith. Here, there are neither allegations of gross of inexplicable negligence nor of bad faith. We simply have a case in which the Union has made a conscious assessment of competing values and has made that assessment consistent with past practice. We must, therefore, reject the majority's contention that "[t]he union's choice to process all grievances based on seniority discriminated against employees receiving promotions on the basis of merit."

The majority's alternative reason for overruling the district court stands on equally shakey grounds. It states that the "jury could also have found evidence of a breach of the duty of fair representation on the basis

that the union failed to notify plaintiffs of the arbitration hearing or invite them to attend."

We agree that failing to notify union members of an arbitration hearing or refusing to permit them to attend and present their own case might, in some cases, constitute grounds for finding a breach of the duty of fair representation. *See Bond v. Local Un. 823, Int. Br. of T., C., W. & H. of America,* 521 F.2d 5 (8th Cir. 1975). *Contra, Ramsey v. N.L.R.B.,* 327 F.2d 784 (7th Cir.), *cert. denied,* 377 U.S. 1003 (1964). Here, however, the plaintiffs knew that the arbitration hearing would be held and did not ask to attend. The plaintiffs had presented their case on skill and ability to management, and management presented that same case to the arbitrator. The plaintiffs made no claim that they could have presented additional evidence to the arbitrator that was not merely cumulative. They made no showing that the result would have been different had the matter been differently presented. Under these circumstances, the trial court properly refused to speculate as to what would have been added by their presence. *See Humphrey v. Moore, supra* at 351; *Deboles v. Trans World Airlines, Inc.,* 552 F.2d 1005 (3rd Cir.), *cert. denied,* 434 U.S. 837 (1977). *See also Cronin v. Sears, Roebuck & Co.,* 588 F.2d 616 (8th Cir. 1978).

Moreover, even if we were to hold that junior employees must be invited to attend arbitration proceedings and be given a chance to present their own case on skill and ability, and that the Union breached its duty by failing to extend such an invitation, we do not know whether the jury found liability on the first or second theory since they were submitted conjunctively. Thus, a remand for a new trial on this theory would be re-

quired rather than a reinstatement of the jury's verdict. *See Superior Combustion Industries v. Schollman Bros. Co.*, 271 F.2d 357 (8th Cir. 1959).

Accordingly, we would affirm the District Court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1034
No. 78-1073
No. 78-1092

CHARLES W. SMITH, JOHN PASLEY and RALPH SERINI, Appellants-Cross-Appellees,
v.
HUSSMANN REFRIGERATOR COMPANY and LOCAL 13889, UNITED STEELWORKERS OF AMERICA, Appellees-Cross-Appellants.

Appeals from the United States District Court for the Eastern District of Missouri

Submitted: July 14, 1978
Filed: January 3, 1979

Before GIBSON, Chief Judge, HENLEY, Circuit Judge, and EISELE, District Judge.*

GIBSON, Chief Judge.

Plaintiffs Charles Smith, John Pasley and Ralph Serini brought suit in the United States District Court for the Eastern District of Missouri against Hussmann Refrigerator Company (hereinafter referred to as Hussmann or the company) and Local 13889, United Steelworkers of America (hereinafter referred to as the union) for breach of the collective bargaining agreement and breach of the duty of fair representation. In Counts

*The Honorable G. Thomas Eisele, Chief Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

II and III, plaintiff Pasley, a black male, charged violations of 42 U.S.C. §§ 1981 and 1985, alleging that defendants discriminated against him on the basis of his race by denying him the rights to make and enforce contracts and by conspiring to deprive him of the equal protection of the law.

The claims of breach of the collective bargaining agreement and breach of the duty of fair representation were tried to a jury which rendered a verdict against both defendants in favor of plaintiff Smith in the amount of $6500 and plaintiff Pasley in the amount of $2500. Also, in response to special interrogatories, the jury found that plaintiffs Smith and Serini should be awarded the classification of maintenance pipefitter, and that plaintiff Pasley's seniority in the pipefitter classification should be upgraded. The District Court[1] entered judgment in accordance with the jury verdict, but subsequently denied plaintiffs' motions for supplementary judgment to effect the advisory opinion of the jury in answer to the special interrogatories, and granted defendants' motions for judgments notwithstanding the verdict.[2] Plaintiffs Pasley, Smith and Serini appeal from the grant of defendants' motions and the denial of their motion and request reinstatement of the jury verdict and an order implementing the jury's advisory opinion.

The claims of race discrimination set forth in Counts II and III were removed from jury consideration, and the court, finding no evidence of racial discrimination, determined that neither defendant had violated 42 U.S.C.

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1. The Honorable John F. Nangle, United States District Judge, Eastern District of Missouri.

2. The District Court opinion is reported at 442 F. Supp. 1144 (E.D. Mo. 1977).

§§ 1981 and 1985.[3] Plaintiff Pasley claims error in the removal of this claim from the jury and also appeals from the decision on its merits.

On cross-appeal defendants argue that if the judgment notwithstanding the verdict is reversed, they are entitled to a new trial for the reasons that plaintiffs had no right to a jury trial; certain jury instructions were improper; and the District Court erred in excluding evidence of the National Labor Relations Board's (NLRB) dismissal of plaintiffs' charges of unfair representation.

At all times relevant to this proceeding, plaintiffs were employees at Hussmann's Bridgeton, Missouri, plant and were members of the union, and a collective bargaining agreement between defendants was in effect pursuant to which the union represented approximately 1500 production and maintenance employees at Hussmann's Bridgeton plant. This agreement specifically provided that in the matter of promotions seniority should govern when the factors of ability and skill are substantially equal between those being considered.[4]

On April 22, 1975, Hussmann, in accordance with the collective bargaining agreement, posted two openings for temporary positions as maintenance pipefitters. Sixty-four employees bid for these openings. Hussmann's maintenance foreman, Schwartz, interviewed groups of

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3. The District Court opinion is reported at 433 F. Supp. 690 (E.D. Mo. 1977).

4. As stated in the company's brief: "The parties' contract provides generally (Article 9, § 1 and Article 10, § 1) that seniority, skill and ability are factors to be considered by the company in making promotions. These two sections further expressly provide that when skill and ability are substantially equal, 'seniority shall govern.' "

the most senior employees and selected Pasley and Smith on the basis of superior skill and ability. On May 6, 1975, Hussmann posted an opening for a permanent maintenance pipefitter. Although forty-six employees bid for this position, it was awarded to Pasley since he was already working in the classification. Three more positions in this classification, one permanent and two temporary, opened on May 13, 1975. An employee who had previously held the classification received the permanent job. Plaintiff Serini and another employee, Watson, received the temporary positions. Subsequently, plaintiff Smith bid into a permanent position as maintenance pipefitter as a result of an opening posted May 20, 1975.

Twenty-six unsuccessful bidders filed grievances claiming that Hussmann had violated the collective bargaining agreement in making the promotions. Of these grievances, the union selected four to process. These four had been filed by the most senior employees with greater seniority than the successful bidders. The union processed these grievances through the five-step grievance and arbitration procedure, as described in the collective bargaining agreement, solely on the basis of the grievants' seniority. At no time did the union evaluate the merits of these grievances in terms of comparing the skill and ability of the grievants with those of the successful bidders even though the validity of the grievances depended upon substantial equality of skill and ability.

At the arbitration hearing, the union called each of the four grievants to testify about his skill and ability. The successful bidders were not invited to attend the hearing and their only representation was presented by Hussmann's foreman, Schwartz, who related the sub-

stance of his interviews with the successful bidders as well as the substance of his interviews with the grievants.

On October 3, 1975, the arbitrator issued his award. He clearly denied two of the grievances on the grounds that the grievants lacked substantial equality of skill and ability. The arbitrator granted two grievances, those of Dattilo and Krassinger, and ordered Hussmann to give them the jobs with retroactive seniority and back pay. Further, the award named as those entitled to hold the maintenance pipefitter classification: Dattilo, Pasley, Smith, Watson, Krassinger and Serini.

Hussmann and the union received this award with some hesitations. Only four jobs were open, but six employees had been awarded the classification. While Hussmann interpreted the award to grant the pipefitter classification to all those on the list, the union objected that the arbitrator did not have authority to create six classifications from four posted jobs.[5] The award also misstated the seniority of plaintiff Smith, giving him ten years more seniority than he actually had, and awarded Watson a position for which he had not bid.

To cure these errors and ambiguities in the award and to avoid problems in its administration, defendants asked the arbitrator for clarification. A meeting for this purpose was held October 31, 1975. No additional testimony was taken and no employees were present except representatives of Hussmann and the union. As a result

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5. The mere status of the classification was important because employees with the classification have priority in filling vacancies. Thus, two extra classifications would remove two future vacancies from prospective bidders.

of prior discussions the parties agreed to stipulate to the employees' actual seniority dates and that only four employees could obtain the pipefitter classification. The arbitrator's supplemental and corrective decision, issued November 4, 1975, awarded the pipefitter classification to the four most senior employees in the order of their seniority. Thus, Dattilo, Krassinger, Watson, and Pasley received the classification in that order.[6] Smith and Serini were entitled to be paid for the time they actually performed the job, but on any future vacancies their bid would be considered on the same basis as any other employee without seniority in the classification.

Plaintiffs attempted to file grievances to challenge the November 4 award. Smith and Serini alleged that they were entitled to the classification, and Pasley challenged the realignment of his seniority. The union refused to process the grievances because of the view that the collective bargaining agreement requires an arbitrator's decision to be considered the final resolution of a dispute, precluding further grievances on the matter. Thereafter, plaintiffs instituted this action.

I. Race Discrimination

On appeal, plaintiff Pasley claims that the District Court clearly erred by removing Pasley's claim of race discrimination from consideration of the jury and by holding that the evidence failed to establish that defendants violated his rights on account of his race. We

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6. Because the arbitrator demoted Pasley to the lowest seniority in the classification, he was temporarily removed from the position due to a reduction in the work force. He subsequently bid back into the position and held it at the time of trial.

find these contentions to be without merit and affirm the District Court on the basis of its well-reasoned memorandum opinion. Plaintiff Pasley failed to establish that any action taken by defendants was the result of race discrimination and the evidence revealed that he was not treated differently from other, white employees. Furthermore, the removal of this claim from the jury cannot be grounds for reversal since plaintiff Pasley did not present sufficient evidence to support a jury verdict in his favor.[7] *See Hays v. Consolidated Service Corporation,* 517 F.2d 564, 565-66 (1st Cir. 1975); *Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 531 F.2d 850, 853 (8th Cir. 1975); *King v. United Benefit Fire Insurance Co.,* 377 F.2d 728, 731 (10th Cir.), *cert. denied,* 389 U.S. 857 (1967); *Freeman Contractors, Inc. v. Central Surety and Insurance Corp.,* 205 F.2d 607, 612 (8th Cir. 1953).

II. The Collective Bargaining Agreement

On appeal, plaintiffs contend that the judgment notwithstanding the verdict was improper because the jury could have found that defendants violated the collective bargaining agreement by submitting the original arbitration decision to the arbitrator for clarification. We view this as too rigid a position. While the collective

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7. We find it unnecessary to decide whether the requested remedy of reinstatement of seniority classification plus back pay should be characterized in this situation as a request for purely equitable relief. As an equitable claim, plaintiff Pasley would not be entitled to a jury trial regardless of unsupported allegations for punitive damages. *See Lynch v. Pan American World Airways, Inc.,* 475 F.2d 764, 765 (5th Cir. 1973).

bargaining agreement provided that arbitration should be the final resolution of a dispute and binding on the parties, this does not preclude requesting an arbitrator to clarify an ambiguous award. The arbitral process is not complete until it produces a decision, properly limited to the scope of the controversy, that clearly specifies the respective rights and duties of those involved. The original award contained errors and ambiguities and it may have been beyond the scope of the arbitrator's authority. It could not be implemented without engendering further dispute. The District Court appropriately concluded that the proper course of action was to request clarification from the arbitrator. *Bell Aerospace Company Division of Textron, Inc. v. Local 516, International Union, United Automobile Aerospace and Agricultural Implement Workers of America (UAW),* 500 F.2d 921, 923-24 (2d Cir. 1974); *San Antonio Newspaper Guild Local No. 25 v. San Antonio Light Division,* 481 F.2d 821, 825 (5th Cir. 1976); *International Brotherhood of Electrical Workers, Local 369, AFL-CIO v. Olin Corporation,* 471 F.2d 468, 472 (6th Cir. 1972); *Printing Pressman's Union No. 135 v. Cello-Foil Products, Inc.,* 459 F.2d 754, 756 (6th Cir. 1972); *La Vale Plaza, Inc. v. R. S. Noonan, Inc.,* 378 F.2d 569, 572-73 (3d Cir. 1967); *Local 719, American Bakery and Confectionery Workers of America, AFL-CIO v. National Biscuit Company,* 378 F.2d 918, 926 (3d Cir. 1967); *Hanford Atomic Metal Trades Council, AFL-CIO v. General Electric Company,* 353 F.2d 302, 307-08 (9th Cir. 1966).

Before the clarification hearing, Hussmann and the union discussed the problems with the arbitration award and agreed to resolve some of the conflict. Before the arbitrator, they stipulated to the correct seniority dates,

the bids made for the positions, and that only four classifications could be awarded. Plaintiffs allege that the stipulation concerning the number of classifications violated their rights under the collective bargaining agreement. We cannot accept this characterization of the stipulations. The collective bargaining agreement did not cover the issue of whether six employees could be awarded the classification and the past practices of the parties did not set a clear example. By agreeing to limit the number of classifications to the number of openings, the parties merely resolved a problem not covered by the collective bargaining agreement; they did not modify or alter contractual rights. *See Price v. International Brotherhood of Teamsters,* 457 F.2d 605, 610-11 (3d Cir. 1972). The settlement was within the range of reasonableness permitted the bargaining agent. *Ford Motor Company v. Huffman,* 345 U.S. 330, 338-39 (1953). It did not prejudice the ability of any particular employee to enter the maintenance pipefitter classification in the future, but merely placed all employees on an equal footing. Also, it is clear that the company and the union were free to negotiate a good faith settlement of the dispute before resorting to arbitration. *Vaca v. Sipes,* 386 U.S. 171, 192 (1967).

III. The Duty of Fair Representation

Plaintiffs contend that the District Court erred in granting the union's motion for judgment notwithstanding the verdict because sufficient evidence was presented from which the jury could have found that the union breached its duty of fair representation as owed to plaintiffs. The standard for granting judgment notwithstanding the verdict is the same as for a directed verdict. *Schneider v. Chrysler Motors Corp.,* 401 F.2d 549, 554

(8th Cir. 1968). As stated by this court in *Lord v. Wilkerson,* 542 F.2d 1034, 1035 (8th Cir. 1976):

> A motion for a directed verdict should be granted "only when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Barclay v. Burlington Northern, Inc., supra,* 536 F.2d at 267; *Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co.,* 523 F.2d 833, 836 (8th Cir. 1975). As this Court has noted,
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> > [A] motion for a directed verdict is properly denied where the evidence presented allows reasonable men in a fair exercise of their judgment to draw different conclusions. * * * In making this determination, the evidence, together with all reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. (Citations omitted.)
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> *Vickers v. Gifford-Hill and Co.,* 534 F.2d 1311, 1315 (8th Cir. 1976), *quoting Giordano v. Lee,* 434 F.2d 1227, 1231 (8th Cir. 1970), *cert. denied,* 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed.2d 709 (1971).

See also Voegli v. Lewis, 568 F.2d 89, 92 (8th Cir. 1977); *Banks v. Koehring Co.,* 538 F.2d 176, 178 (8th Cir. 1976); *Griggs v. Firestone Tire & Rubber Co.,* 513 F.2d 851, 857 (8th Cir.), *cert. denied,* 423 U.S. 865 (1975).

After a careful review of the record, we conclude that plaintiffs presented sufficient evidence to support the jury's finding of a breach of the duty of fair representation, and, therefore, reverse the judgment of the District Court as it relates to this claim.

The duty of fair representation developed as a corollary to the collective bargaining system promoted by Congress and administered by the NLRB. This system grants to a union the power to act as exclusive bargaining representative and necessarily subordinates the interests of an individual employee to the collective interests of all employees in the bargaining unit. *Vaca v. Sipes, Supra,* 386 U.S. at 182. Because of the reduction in the individual rights of employees thus represented by a union, the controlling statutes have long been interpreted as imposing upon the union, as exclusive bargaining agent in the negotiation and administration of the collective bargaining contract, a responsibility and duty to fairly represent as individuals as well as collectively the employees within the bargaining unit. *Humphrey v. Moore,* 375 U.S. 335, 342 (1964); *Ford Motor Company v. Huffman,* 345 U.S. 330, 337-38, *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192, 202 (1944).

The rationale for this statutory interpretation was clearly expressed by the United States Supreme Court:

> It is the principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 202 (1944).

While the scope of the duty of fair representation has never been precisely defined, it "is a legal term of art, incapable of precise definition" and calls for an ad

hoc review of each factual situation. *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 469 F.2d 181, 182 (4th Cir. 1972). Its evolution through the fires of court decisions leaves no doubt about its purpose. *St. Clair v. Local Union No. 515 of the International Brotherhood of Teamsters,* 422 F.2d 128, 130 (6th Cir. 1969). The duty of fair representation balances the collective and the individual interests of employees in the bargaining unit as these interests are represented by a labor organization in order to promote the goals of congressional labor legislation, to minimize industrial strife and encourage full production.[8] In particular, "the duty

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8. 20 U.S.C. § 141(b) provides:

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts of practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes, supra,* 386 U.S. at 182.

In order to meet its purpose, the scope of the duty of fair representation is in some ways very broad. The responsibility to fairly represent employees is equal in scope to the union's broad authority in the negotiation and administration of the collective bargaining agreement. *Humphrey v. Moore,* 375 U.S. 335, 342 (1964). Thus the duty attaches to all stages of the negotiation and administration process and is owed to all employees within the unit represented. However, because of the need to properly balance the individual interests of employees with their collective interests, the duty of fair representation must not be construed to subvert the basic purposes of organized labor by inhibiting union representation of collective interests. The Supreme Court has stated that in the negotiation process, "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Company v. Huffman, supra,* 345 U.S. at 338. The standard by which to measure union conduct was further defined in *Vaca v. Sipes,* 386 U.S. 171 (1967). In the administration of the collective bargaining agreement, the union has "a statutory obligation to serve the interests of all members [of a designated unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177.

The Fourth Circuit Court of Appeals clearly articulated the import of *Vaca* in *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 469 F.2d 181, 183 (4th Cir. 1972);

> A union must concern its behavior to each of these three separate standards. First, it must treat factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.
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> * * * Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation.

Applying this standard to the union's conduct in processing the grievance challenging plaintiffs' promotions, we find that sufficient evidence existed for the jury to conclude that the union exceeded the permissible range of reasonableness with regard to its representation of plaintiffs. There can be no question that the scope of the duty of fair representation encompasses plaintiffs' interests in this situation. Plaintiffs were employees within the bargaining unit and processing grievances is within the broad authority of the union as the employees' exclusive agent in the administration of the collective bargaining

agreement.[9] *See Vaca v. Sipes, Supra,* 386 U.S. at 177. The processing of the grievances against plaintiffs was intended to and did decide plaintiffs' rights to the promotions, which plaintiffs had received from management on the basis of their superior skill and ability. *See Tedford v. Peabody Coal Company,* 533 F.2d 952, 959 (5th Cir. 1976) ("the union in making its decision not to put [grievant] back in his old position had a duty to consider not only the interests of [the grievant] but also those of the twelve employees who would suffer from the resulting rollback * * *."); *Bond v. Local Union 823, International Brotherhood of Teamsters,* 521 F.2d 5, 9 (8th Cir. 1975), (union processed "test" case grievance rather than plaintiff's grievance). This is analogous to

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9. The collective bargaining agreement between Hussmann and the union granted to the union the exclusive power to process and settle grievances and to carry cases to arbitration.

> By virtue of this contractually derived status as the exclusive enforcer of the collective agreement, the union assumes a heavy responsibility to exercise its control on behalf of, rather than against the individual employee. The collective agreement creates rights in the individual employee which are enforceable under section 301. In the absence of a union controlled grievance procedure the individual can sue and enforce his rights in his own behalf. The effect of the contractual provision giving the union exclusive control over the grievance procedure is to deprive the individual of his ability to enforce the contract on his own behalf. The union, having deprived the individual of his ability to enforce his rights, has a special obligation to act on his behalf.

Summers, *The Individual Employees' Rights Under The Collective Agreement: What Constitutes Fair Representation?* 126 U. Pa. L. Rev. 251, 256 (1977) (footnote omitted).

when a union processes the grievances of some employees regarding their seniority status. Upholding the grievances necessarily derogates the seniority of other employees. *Butler v. Local Union 823, International Brotherhood of Teamsters,* 514 F.2d 442, 455 (8th Cir.), *cert. denied,* 423 U.S. 924 (1975). In that situation the union must fairly represent both groups of employees and may take a position in favor of one group only on the basis of an informed, reasoned judgment as to the merits of the claims in terms of the language of the collective bargaining agreement. *See Humphrey v. Moore,* 375 U.S. 335 (1964); *Deboles v. Trans World Airlines, Inc.,* 552 F.2d 1005, 1015 (3d Cir. 1977); *Price v. International Brotherhood of Teamsters,* 457 F.2d 605, 611 (3d Cir. 1972).

This duty to fairly represent all employees is not diminished because plaintiffs' rights were created by Hussmann. The particular provision of the collective bargaining agreement provided that employees with superior skill and ability were entitled to promotion over those with greater seniority only if the company elected to assert its right to promote on the basis of skill and ability. This provision, typically referred to as a "modified seniority clause," controlled the promotion machinery. The company asserted its right to choose on the basis of skill and ability because of the belief that the position of maintenance pipefitter required greater expertise than most positions within the company. It is significant that no openings in this classification had occurred for over thirteen years; thus the company did not have any established past practices for promotions into this classification with which the union could challenge compliance. Hussmann had a right to choose on the basis of skill and ability, and by its exercise of this

right it vested plaintiffs with rights under the collective bargaining agreement to hold the positions to which they were promoted.[10] The collective bargaining agreement clearly provided that employees promoted by the company on the basis of superior skill and ability are entitled to hold their promotions even against challenges by employees with greater seniority. Thus, plaintiffs possessed rights under the collective bargaining agreement which the union had a fiduciary duty to protect.[11] The fact that their rights were contingent upon selection by the company became irrelevant once that contingency was resolved and not challenged. It is no different from the condition that plaintiffs possess superior skill and ability, which was the condition challenged by the grievants. The union took a blind, arbitrary stand in favor of seniority without even investigating plaintiffs' skill and ability, and treated plaintiffs as adversaries in its zealous insistence on seniority *vel non*.

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10. Hussmann's promotion of the junior employees on the basis of substantially superior skill and ability vested them with rights as third party beneficiaries of the collective bargaining agreement. Thus even the company would be bound to respect these rights and follow the terms of the collective bargaining agreement in the event it desired to remove the employees from the classification.

11. Because by the terms of the collective bargaining agreement only the company had the power to vest employees with a right to a promotion, the union obviously owed no duty to represent employees other than those selected by the company and those with greater seniority than the employees selected. No other employees could possibly have any rights to the promotions under the collective bargaining agreement. *Local Union 1357, International Brotherhood of Electrical Workers, AFL* v. Mutual Telephone Company, 23 Lab. Cas. ¶ 67,634 at 83,792 (Sup. Ct. Hawaii 1952).

The nature of the union's duty in a dispute among employees is not changed by the company taking a position in the grievance procedure. Even though a company may take a position favorable to a particular group of employees, the union may not abandon that particular group to the representation as afforded by the company favoring them. *See Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005 (3d Cir. 1977); *Price v. International Brotherhood of Teamsters*, 457 F.2d 650 (3d Cir. 1972). The union is the agent of all employees in the unit and owes a fiduciary duty to represent their interests and rights under the collective bargaining agreement. Here the union not only abandoned the plaintiffs but took a negative and adversary attitude toward them regarding the positions they had received by reason of the company's opinion of their skill and ability.

The first aspect of the union's conduct in processing the grievances challenging plaintiffs' promotions that indicates substandard representation of plaintiffs' interests is the union's strict adherence to the principle of seniority. The union concedes that in processing the grievances it merely followed a policy of favoring employees with the greatest seniority, but argues that this cannot be a ground for finding a breach of the duty of fair representation because it was merely in good faith applying a neutral principle. Since we agree with the District Court's finding that there is no evidence that hostility toward plaintiffs motivated the use of this policy, we are squarely presented with the issue of whether this course of action nevertheless could be found "so unreasonable and arbitrary as to constitute a violation of the duty of fair representation." *Griffin v. International Union, United Automobile, Aerospace and Agri-*

cultural Implement Workers of America, UAW, 469 F.2d 181 (4th Cir. 1972).

Contrary to the arguments of the union, seniority is not a "neutral" principle. A seniority system is value-laden, embodying many salutary and legitimate expectations of labor. These systems promote job security and acknowledge the values of longer service, such as demonstrated loyalty and greater experience. However, not all of the values embodied in the principle of seniority favor the best interests of labor or society. The use of seniority in making promotions may sometimes frustrate the basic purposes of congressional labor legislation and the united labor movement. It can diminish worker satisfaction and obstruct efficient production, thus lowering productivity. As a matter of common sense, verified by behavioral science, a company must be able to reward employees for superior ability and performance or face a loss of its most competent employees and an increase in worker frustration and indolence.

The union's choice to process all grievances based on seniority unfairly discriminated against employees receiving promotions on the basis of merit. This conduct may be viewed as a perfunctory dismissal of the interests and rights of plaintiffs. The union simply failed to represent them in any way. The modified seniority clause specifically required balancing the interests of merit and seniority whenever Hussmann deemed that the position warranted selection on the basis of merit. Under the collective bargaining agreement, after the company chose to select on the basis of merit, three separate considerations were relevant in determining the right of an employee to be promoted. These were (1) his selection by the company, (2) on the basis of skill

and ability, (3) superior to the skill and ability of any senior employee who had bid for the position. The unions' disregard for the qualification of superior skill and ability manifests an arbitrary and perfunctory approach to promotion interests, just as if it had chosen to ignore the qualification of selection by the company. *See Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 469 F.2d 181, 183 (4th Cir. 1972); *De Arroyo v. Sindicato de Trabajadores Packing House, AFL-CIO,* 425 F.2d 281, 284 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970); *Gilstrap v. Mitchell Bros. Truck Lines,* 270 Ore. 599, 529 P.2d 370, 374-75 (1974), *cert. denied,* 421 U.S. 1011 (1975).

As one commentator, after reviewing the applicable cases, concluded:

> When the union's effort to represent a member of the collective bargaining unit falls below the level at which the court can conclude that the union has made a conscious, earnest effort to represent him, liability should flow. Upon a claim of substandard treatment, the union should be required to come forward with evidence to show why it followed the course of representation that it did. If the union's behavior is based on a conscious assessment of fairly competing values, it should be given broad discretion in its choice of representation tactics. But the union should not be allowed to plead, in effect, that it chose the easier path because of convenience or rigid adherence to "union policy."

Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights,* 51 TEX. L. REV. 1037, 1102 (1973).

The jury could easily have found that the union owed plaintiffs a duty to investigate the merits of the grievances that challenged plaintiffs' rights to the promotions. The union may not tie its own hands by blind adherence to a policy of favoring employees with seniority in order to avoid disputes between employees. "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." *Humphrey v. Moore, supra,* 375 U.S. at 349-50. The need for a union to evaluate the merits of grievances has been recognized repeatedly. "In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of a particular grievances." *Vaca v. Sipes, supra,* 386 U.S. at 194. *See Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 558 (1976); *Foust v. International Brotherhood of Electrical Workers,* 572 F.2d 710, 715-16 (10th Cir. 1978); *Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 531 F.2d 850, 853-54 (8th Cir. 1975); *Ruzicka v. General Motors Corp.,* 523 F.2d 306, 310, *rehearing denied,* 528 F.2d 912 (6th Cir. 1975). In particular, this court has recognized that certain circumstances compel a union to evaluate the individual capabilities of employees. *Petersen v. Rath Packing Co.,* 461 F.2d 312, 316 (8th Cir. 1972).

By negotiating the modified seniority clause to control promotion decisions, the union has limited management in an area regarded by management as one of its most important prerogatives. This limitation on management serves to shift some of the burden for making promotions onto the union. Responsible union participa-

tion can ensure that the use of the seniority criterion in these decisions is not incompatible with efficiency and employee morale. Union involvement that is not characterized by care and thoughtful preplanning can lead to subversion of the collective bargaining agreement by processing baseless grievances. S. H. SLICHTER, J. J. HEALY & E. R. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 178-210 (1960). *See also Humphrey v. Moore, supra,* 375 U.S. at 349-50. A policy of processing all grievances based on seniority regardless of their merit may even significantly alter the negotiated contract by chilling the exercise of the prerogative to promote on the basis of merit. Since a business runs on a cost-benefit basis, the cost of arbitrating the grievances of all senior employees may at times be greater than the benefit of advancing the most skilled worker. Adherence to the union's policy in this situation would effectively set aside a provision of the collective agreement. "Such a cavalier treatment of the contract is scarcely consistent with the contemplation of the parties and seems contrary to the union members' understanding and expectations when they ratified the contract." Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?* 126 U. PA. L. REV. 251, 264 (1977). *See also Vaca v. Sipes, supra,* 386 U.S. at 191-92; *Humphrey v. Moore, supra,* 375 U.S. at 349-50.

In addition to the arbitrary manner of choosing which employees to favor, plaintiffs also claim that the jury could have found a breach of the duty of fair representation on the basis that the union failed to notify them of the arbitration hearing or invite them to attend. Regardless of the initial evaluation of the grievances, it

appears obvious that once a union has chosen to arbitrate a dispute adequate presentation of all employee claims is necessary to ensure fairness in the arbitration. *See* Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119, 1169 (1973). Since a union's failure to inform an employee whose interests are before an arbitrator of the arbitration hearing is not always sufficient to support a claim of unfair representation, courts have carefully searched the records for prejudice to the employee. When the position of the employee has been adequately presented, no breach has been found. For example, in *Humphrey v. Moore,* 375 U.S. 334 (1964), a joint committee decided to dovetail the seniority lists of two merging companies. The Supreme Court, holding that the union was entitled to take a position in the dispute between employees, carefully noted that the disfavored employees had been given notice of the hearing and that three stewards representing them were present at the hearing and given every opportunity to state their position. *Humphrey v. Moore, supra,* 375 U.S. at 350-51. *See also Ramsey v. NLRB,* 327 F.2d 784, 788 (7th Cir.), *cert denied,* 377 U.S. 1003 (1964); *Bernard v. McLean Trucking Co.,* 429 F. Supp. 284, 286-87 (D. Kan. 1977); *Siskey v. General Teamsters, Chauffers, Warehousemen & Helpers, Local No. 261,* 419 F. Supp. 48, 53 (W.D. Pa. 1976); *De Belsey v. Chemical Leaman Tank Lines,* 368 F. Supp. 1159, 1163 (E.D. Pa. 1973); *Davidson v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 1189,* 332 F. Supp. 375, 378-79 (D. N.J. 1971). However, when the employee is prejudiced by not having notice of the hearing because the union inadequately prepared or presented his situation, a breach of the duty of fair representation has been

demonstrated. *Bond v. Local Union 823, International Brotherhood of Teamsters,* 521 F.2d 5, 9 (8th Cir. 1975); *Thompson v. International Association of Machinists,* 258 F. Supp. 235, 239 (E.D. Va. 1966).

The union claims that plaintiffs could not have been deprived of a fair hearing because Hussmann fully and adequately defended their position. The union argues that since the only evidence of plaintiffs' skills and abilities cognizable at the hearing was as they were known by the company foreman, Schwartz, who had selected plaintiffs, the plaintiffs' testimony would have been meaningless. The facts belie this argument. Although Schwartz testified as to his evaluation and knowledge of the skill and abilities of both plaintiffs and the grievants, the union requested the grievants to attend the hearing and testify as to their abilities and work experience. The arbitrator's decision specifically refers to this testimony as well as the testimony of Schwartz. This *ex parte* presentation by the union clearly discriminated against plaintiffs and hindered their effort to secure an objective consideration of their promotions on the basis of superior skill and ability. In this situation, we cannot say that the jury had no basis for concluding that plaintiffs were deprived of full and adequate representation at the hearing. The union permitted the grievants to have an unfair advantage in the presentation of their positions.

Plaintiffs also argue that the jury could have found that the union breached its duty of fair representation by requesting clarification of the original arbitration award and by failing to notify plaintiffs of the hearing concerning clarification. This argument lacks merit. The

request for clarification was proper[12] and at this hearing no additional testimony was taken. Hussmann and the union merely presented the arbitrator with the correct seniority dates and bid sheets and requested him to clarify which four employees should be awarded the four positions that had opened. Unlike the situation of the original hearing where the grievants were given an unfair advantage, plaintiffs were not prejudiced by the failure to notify them.

Nor did the union's failure to accept and process plaintiffs' grievances constitute a breach of the duty of fair representation. The union did not arbitrarily or perfunctorily deny these grievances but in good faith reasonably concluded that the final and binding clause of the collective bargaining agreement prohibited processing them. *Humphrey v. Moore,* 375 U.S. 335 (1964).

IV. Cross-Appeal

Both Hussmann and the union assert that in the event that the judgment notwithstanding the verdict is reversed, errors in the trial stage warrant remanding for a new trial. Since we have upheld the judgment notwithstanding the verdict as it relates to Hussmann, we only address the arguments of the union.

First, the union argues that plaintiffs had no right to a jury trial, although it candidly concedes that the law in this circuit is contrary to its position. *Minnis v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 531 F.2d 850 (8th Cir. 1975), explicitly held that plaintiffs

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12. See discussion in Part II, *The Collective Bargaining Agreement.*

charging a breach of the duty of fair representation are entitled to a jury trial. In view of the union's failure to show any error in the analysis made in *Minnis,* we decline to overrule its holding.

The union also alleges that the jury was improperly instructed concerning the duty of fair representation. Part of the instructions seemed to indicate that a verdict could be entered against the union merely upon a finding that by not processing plaintiffs' grievances the union had violated a provision of the collective bargaining agreement. As the union, however, acknowledges, this instruction must be read in the context of the charge as a whole, *Simpson v. Norwesco, Inc.,* No. 78-1038, slip op. at 9 (8th Cir. Aug. 31, 1978); *Fields v. Chicago, Rock Island and Pacific Railroad Co.,* 532 F.2d 1211, 1213 (8th Cir. 1976); *Alabama Great Southern Railway Co. v. Chicago & Northwestern Railway Co.,* 493 F.2d 979, 986 (8th Cir. 1974); *Jiffy Markets, Inc. v. Vogel,* 340 F.2d 495, 500 (8th Cir. 1965). Directly after the allegedly erroneous instruction, the court instructed:

> The union's right to consider grievances of its members and to make good faith decisions relative thereto carries with it a broad discretion. That discretion means that the union's decision should not be disturbed so long as it was made honestly and in good faith. This is true even if you were to believe that the union was in error.
>
> * * * *
>
> If and only if you of the jury find that United Steelworkers of America, Local 13889, breached its legal duty of fair representation * * * may you return a verdict for any of the plaintiffs and against either or both of the defendants.

Appendix.

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. In order to make out such a claim of arbitrary, discriminatory or bad faith conduct there must be substantial evidence of fraud, deceitful action or dishonest conduct; this involves more than errors in judgment. Simply stated, of necessity a wide range of reasonableness must be allowed a bargaining representative in serving the employees it represents and, as a result there is no basis for second-guessing the decisions of that representative in handling a grievance absent the requisite substantial evidence of arbitrary, discriminatory or bad faith conduct. If and only if you, the jury find substantial evidence of fraud, deceitful action or dishonest conduct may you conclude that United Steelworkers of America, Local 13889 breached its duty of fair representation.

We find that this instruction clarifies that mere error on the part of a union is not sufficient to establish a breach of the duty of fair representation. Furthermore, we note that this instruction was overly generous to the union. Honesty and good faith are not sufficient to defend against a charge of unfair representation if the union's conduct is otherwise arbitrary or discriminatory, *Vaca v. Sipes, supra,* 386 U.S. at 177; *Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW,* 469 F.2d 181, 183 (4th Cir. 1972), nor must a jury necessarily find substantial evidence of fraud, deceitful action or dishonest conduct to conclude that a union breached its duty of fair representation. *See Foust v. International*

Brotherhood of Electrical Workers, 572 F.2d 710, 714-15 (10th Cir. 1978).

The union also asserts that the District Court erred when it excluded evidence of the NLRB's failure to issue a complaint after plaintiffs filed unfair labor practice charges. A trial court has wide discretion in ruling on the admissibility of evidence. *Simpson v. Norwesco, Inc.,* No. 78-1038, slip op. at 10 (8th Cir. Aug. 31, 1978); *General Insurance Co. of America v. Hercules Construction Co.,* 385 F.2d 13, 24 (8th Cir. 1967). The Federal Rules of Evidence Rule 403 permits exclusion of evidence if the court determines that "its probative value is substantially outweighed by the danger of unfair prejudice." On balance, we do not think the decision to exclude the evidence of the NLRB's failure to issue a complaint was an abuse of discretion. The possibility of jury confusion and potential misunderstandings as to the weight to be accorded this evidence presented a danger of unfair prejudice to plaintiffs and the probative value of the evidence was not overwhelming. The NLRB general counsel has unreviewable discretion to refuse to issue an unfair labor practice complaint, and plaintiffs were not afforded a hearing before the NLRB. *See Vaca v. Sipes, supra,* 386 U.S. at 182-83.

V. Conclusion

Although we uphold the District Court's grant of the motion for judgment notwithstanding the verdict with regard to violation of the collective bargaining agreement, we hold that sufficient evidence supported the jury finding that the union breached its duty of fair representation and reverse the District Court on this issue. Since we deny the union's request on cross-appeal

for a new trial, the issue of the appropriate relief for plaintiffs must be resolved. Plaintiffs contend that they are entitled to the damages awarded by the jury and to a judgment in accord with the advice of the jury, in response to special interrogatories, in favor of restoring plaintiffs' seniorities and classifications to their positions before the union processed grievances against them. The trial court rejected the jury's advisory recommendation, preferring to avoid interference with the arbitrator's decision and with the employment arrangements at Hussmann's Bridgeton plant.

Although we might prefer to award equitable relief, we cannot say that the District Court abused its discretion in denying an equitable remedy in the circumstances of this case. The District Court was at liberty to accept or reject the advisory findings. *Chicago & North Western Railway Co. v. Minnesota Transfer Railway Co.*, 371 F.2d 129, 130 (8th Cir. 1967). The decision is in accord with the prevailing policy favoring the finality of arbitration awards, *see United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and avoids practical problems that might preclude fashioning appropriate relief. Therefore, we reinstate the original judgment of the District Court awarding compensatory damages of $6500 in favor of Smith and $2500 in favor of Pasley in accord with the jury verdict.[13]

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13. The only tangible evidence of damages in the record is the amount of back pay up until the time of trial. Although the jury rendered a verdict in excess of this amount, the evidence adequately supports the verdict. In determining the amount of damages, the jury was entitled to take into account the continuing nature of the injury sustained by plaintiffs. Plaintiff Smith lost his classification as maintenance pipefitter, and plaintiff Pasley suffered a demotion of his seniority

The judgment of the District Court is affirmed in part, vacated in part, and modified as set forth herein. The case is remanded to the District Court for entry of a judgment consistent with this opinion.

Costs assessed in favor of plaintiffs against the union.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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status within the classification. From the direct evidence of compensation already lost, the jury could compute the reasonably foreseeable future losses attributable to the injury. There is no indication that the amount awarded reflects damages for mental distress or punitive damages, imposition of which the circumstances of this case do not warrant. *See Emmanuel v. Omaha Carpenter's District Council,* 560 F.2d 382, 386 (8th Cir. 1977); *Butler v. Local 823 International Brotherhood of Teamsters,* 514 F.2d 442, 454 (8th Cir.), *cert. denied,* 423 U.S. 924 (1975); *Richardson v. Communications Workers of America,* 443 F.2d 974, 982-85 (8th Cir.), *cert. denied,* 414 U.S. 818 (1971).

Appendix.

Charles W. SMITH, John Pasley, and Ralph Serini,
Plaintiffs,
v.
HUSSMANN REFRIGERATOR COMPANY and
Local 13889, United Steel Workers of America,
Defendants.

No. 76-126C(4).

United States District Court,
E. D. Missouri, E. D.

July 12, 1977.

MEMORANDUM

NANGLE, District Judge.

Plaintiff John Pasley filed suit, alleging, in part, discrimination on the basis of race. 42 U.S.C. §§ 1981 and 1985. Other claims asserted by plaintiff were previously tried to a jury and judgment has been entered in accordance with the jury's verdict. Only the claims of racial discrimination remain.

The Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, the stipulations of the parties, and being otherwise fully advised of the premises, hereby makes the following findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure:

FINDINGS OF FACT

1) Plaintiff John Pasley is a black male citizen of the United States. At all times relevant herein, plaintiff has been an employee of defendant Hussmann Refrigerator Company and a member of defendant Local 13889, United Steelworkers of America.

2) Defendant Hussmann Refrigerator Company is a corporation organized and existing by virtue of law. Said defendant is a person within the meaning of 42 U.S.C. §§ 1981 and 1985.

3) Defendant Local 13889 United Steelworkers of America is a labor organization representing employees and has been at all times relevant herein the collective bargaining agent for the employees at defendant Hussmann Refrigerator Company.

4) The collective bargaining agreement entered into by the two defendants contains the following provisions:

> The majority decision of the arbitration board shall be final and binding upon the parties. Art. 7.
> Ability and required performance of an employee on the job shall be factors considered for promotions. When such factors are substantially equal among those being considered, seniority shall govern. Art. 10.

5) On April 22, 1975, defendant Company posted jobs for the position of maintenance pipe fitter. Sixty-four employees bid for this job including plaintiff and several employees with greater seniority than plaintiff. Plaintiff was awarded the job by the Company on April 28, 1975, based upon the Company's assessment of his skill and ability.

6) On May 6, 1975, defendant Company again posted jobs for maintenance pipe fitter on the second shift. Forty-six bids were made. Plaintiff was working in this classification on the first shift, in a temporary position. He bid for and was awarded the permanent second shift job by defendant Company. Included among

the forty-six who bid for this job were a number with greater seniority than plaintiff.

7) Grievances were filed by employees Dattilo, Looney, Krassinger and Robinson all of whom contended that their seniority entitled them to prevail in the bidding. These grievances challenged the award of the classification not only to plaintiff but to other employees as well. These other employees were white.

8) Defendant union processed these grievances through the grievance procedure. Arbitrator Raymond Roberts was appointed to hear the grievances and on August 29, 1975, an arbitration hearing was held. Defendant Company, through its foreman, presented evidence to support the selection of plaintiff. The union presented evidence on behalf of the grievants. Neither plaintiff nor the other employees whose classifications were being challenged were notified of the arbitration hearing. The evidence indicated that plaintiff was aware of the hearing but did not ask to attend or present evidence.

9) The arbitrator, on October 3, 1975, issued his decision awarding the classification of Maintenance Pipe Fitter to the following individuals in the following order:

1. August Dattilo;
2. John Pasley;
3. Charles Smith;
4. Winfred Watson;
5. George Krassinger;
6. Ralph Serini.

10) Employee James Pogue filed a grievance against Ralph Serini for the position of Maintenance Pipe Fitter after the arbitrator's award was made.

11) Plaintiff was not deprived of his classification as a result of his award. The award, however, created difficulties for defendants in that the arbitrator had determined that six employees were qualified while there were only four permanent openings. Additionally, the arbitrator had stated the wrong seniority date for one employee and had awarded another employee a position for which he had not bid.

12) Defendants asked the arbitrator to clarify the award. A meeting was held on October 31, 1975 at which no additional testimony was offered. Plaintiff was not notified of this meeting, nor were the other employees whose classifications were involved. The arbitrator was shown the seniority dates of various employees and was asked to rank the persons entitled to the jobs. On November 4, 1975, the arbitrator issued a supplemental decision. Under this decision, plaintiff was placed at number four in seniority. He never lost his classification.

13) Due to a reduction in work force, plaintiff was temporarily removed from the maintenance pipe fitter classification. He was subsequently able to bid back into the classification and held that job at the time of trial.

14) Plaintiff attempted to file a grievance following the supplemental decision of the arbitrator. The union, however, refused to accept the same, holding the opinion that the arbitrator's decision on the classification awards had been, at that time, finally and fully determined. There is no evidence that the union's decision was the result, in whole or in part, of racial discrimination.

15) The grievance filed by James Pogue went to arbitration on December 5, 1975. Evidently, the effect of this grievance, after the supplemental arbitration award, was to attack plaintiff's classification, and not that of Serini against whom it was originally filed. The grievance was denied.

16) The credible evidence fails to establish that defendants had agreed prior to the October 31, 1975 meeting as to which four people would be designated to hold the maintenance pipe fitter job. Neither defendant instructed the arbitrator on what position to place plaintiff in. The evidence totally failed to establish any conspiracy by defendants to deprive plaintiff of his classification because of his race. The credible evidence failed to establish that defendants' actions were the result, in whole or in part, of racial considerations.

CONCLUSIONS OF LAW

This Court has jurisdiction over the subject matter and the parties to this suit in accordance with 28 U.S.C. § 1343.

Title 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

Title 42 U.S.C. § 1985 prohibits conspiracies to deprive persons of equal protection of the law, or equal privileges and immunities under the law. The evidence fails to establish that defendants' actions violated any

of plaintiff's rights on account of his race. *Cf., Long v. Ford Motor Company,* 496 F.2d 500 (6th Cir. 1974); *O'Neill v. Grayson County War Memorial Hospital,* 472 F.2d 1140 (6th Cir. 1973).

[1] Plaintiff argues that defendant union violated his rights in failing to give him notice of the arbitration hearings. Whether plaintiff has a right to be present at the arbitration hearing is questionable. See *Ramsey v. National Labor Relations Board,* 327 F.2d 784 (7th Cir. 1964), *cert. denied,* 377 U.S. 1003, 84 S.Ct. 1938, 12 L.Ed. 2d 1952 (1964); *Thompson v. International Association of Machinists,* 258 F.Supp. 235 (E.D.Va. 1966). It is clear, however, from the evidence, that the failure to notify plaintiff of the arbitration hearing was not the result of racial discrimination or a conspiracy based herein. Other employees, in the same situation as plaintiff herein, were not notified of the arbitration hearings; these other employees were white. Accordingly, the Court concludes that the failure to give notice violates neither § 1981 nor § 1985.

[2] Plaintiff also argues that the issue should not have been resubmitted to the arbitrator, since the collective bargaining agreement provides that the decision of the arbitrator is final. Under the circumstances, the Court is hesitant to conclude that this resubmission was wrongful, since an ambiguity existed. *Hanford Atomic Metal Trades Council, AFL-CIO v. General Electric Company,* 353 F.2d 302 (9th Cir. 1965); *Smith v. Union Carbide Corporation,* 350 F.2d 258 (6th Cir. 1965); *International Brotherhood of Electrical Workers, Local 369, AFL-CIO v. Olin Corporation,* 471 F.2d 468 (6th Cir. 1972); *Local 719, American Bakery and Confectionery Workers of America, AFL-CIO v. National Biscuit Com-*

pany, 378 F.2d 918 (3d Cir. 1967); *La Vale Plaza, Inc. v. R. S. Noonon, Inc.,* 378 F.2d 569 (3d Cir. 1967). Moreover, the resubmission affected the classification of other employees who were white. The Court has found that defendants did not designate which persons the arbitrator should choose and did not instruct the arbitrator to place plaintiff in any particular spot. The Court has also found that the credible evidence failed to established that the resubmission was the result, in whole or in part, of racial discrimination or a conspiracy based thereon. Accordingly, the Court concludes that the resubmission did not violate plaintiff's rights under the laws.

[3] Plaintiff's last contention is the refusal on the part of the union to accept his grievance following the arbitrator's supplemental decision. The Court found that the union's decision to refuse the same was not the result of racial discrimination, but was based upon its belief that the decision was then final. Accordingly, plaintiff has failed to establish any violation of § 1981.

Judgment will be entered for defendants.

Appendix.

Charles W. SMITH, John Pasley and Ralph Serini,
Plaintiffs,

v.

HUSSMANN REFRIGERATOR COMPANY and
Local 13889, United Steelworkers of America,
Defendants.

No. 76-126C(3).

United States District Court,
E. D. Missouri, E. D.

Dec. 20, 1977.

MEMORANDUM

NANGLE, District Judge.

This matter is before the Court upon the motions of defendants Hussmann Refrigerator Company and United Steelworkers of America, Local 13889 for judgment notwithstanding the verdict, or in the alternative, for a new trial. Additionally, plaintiffs have filed a motion for supplementary judgment in accordance with the advisory verdict of the jury. Plaintiffs brought this suit, pursuant to 29 U.S.C. § 185, seeking damages, classification awards, a change in seniority, and attorney's fees. The cause was tried to a jury who rendered verdicts in favor of plaintiff Charles W. Smith in the amount of $6,500.00 and plaintiff John Pasley in the amount of $2,500.00. Without objection by any party, special interrogatories were submitted to the jury in an advisory capacity. Rule 39(c), Federal Rules of Civil Procedure. The jury answered the special interrogatories, finding that plaintiffs Charles Smith and Ralph Serini should be awarded the classification of maintenance pipe fitter, and that plaintiff John Pasley's seniority as maintenance pipe fitter should be changed.

Appendix.

The facts underlying this suit are as follows: On April 22, 1975, defendant Hussmann posted jobs for the position of maintenance pipe fitter. Sixty-four employees bid for this job. Chosen were plaintiff Pasley and plaintiff Smith. On May 6, 1975, defendant Hussmann again posted jobs for maintenance pipe fitter on the second shift. Forty-six bids were made. The positions were awarded to plaintiff Serini and an employee named Watson. Following these awards, several employees filed grievances. The contract between defendants contained what is referred to as a "modified seniority clause" which provides that seniority will prevail in determining promotions only where abilities and performance are substantially equal. If substantial equality does not exist, defendant Hussmann is free to ignore seniority and promote the better qualified employees. The grievances which were filed were filed by employees with greater seniority than the employees promoted; the grievants contended that there was substantial equality in terms of ability and performance and thus seniority should prevail. Defendant union processed the grievances and on August 29, 1975, an arbitration hearing was held. Defendant Hussmann, through its foreman, presented evidence to support the selection of plaintiffs herein. The union presented evidence on behalf of the grievants. None of the plaintiffs, whose classifications were being challenged, were notified by defendant Union or defendant Hussmann of the hearing; there was some evidence, however, that some, if not all, of the plaintiffs knew of the hearing. On October 3, 1975, the arbitrator issued his decision awarding the classification of maintenance pipe fitter to the following individuals: Dattilo; Pasley; Smith; Watson, Krassinger; and Serini. This meant that there were six employees

for only four openings. Additionally, the arbitrator had stated the wrong seniority date for one employee and had awarded another employee a position for which he had not bid. Defendants therefore asked the arbitrator to clarify the award. A meeting was held on October 31, 1975 at which no additional testimony was offered. None of the employees involved were notified of the meeting. The arbitrator was shown the seniority dates of various employees and was asked to rank the persons entitled to the jobs. On November 4, 1975, the arbitrator issues a supplemental decision, awarding the classifications to the following individuals in the order set forth: Dattilo, Krassinger, Watson, Pasley. Plaintiffs thereafter attempted to file a grievance. Defendant Union, however, refused to accept the same.

It is the Court's conclusion that the jury's advisory verdict should be rejected and that defendants' motions should be granted. The Court is of the opinion that plaintiffs have failed to establish a breach of the duty of fair representation or a breach of the contract.

The gravamen of plaintiffs' complaint is that they were not given notice of the arbitration hearing and thus were not present; that the issue was resubmitted to the arbitrator after the first decision was rendered even though the decision of the arbitrator under the terms of the collective bargaining agreement was to be final; and that the union failed to accept grievances following the second decision of the arbitration.

[1, 2] Under the circumstances that existed herein, the Court concludes that no breach of the duty of fair representation, or of the contract itself, occurred upon a failure to notify plaintiffs of the arbitration hearing. In *Thompson v. International Association of Machinists,*

258 F.Supp. 235 (E.D.Va. 1966), the Court held that the union breached its duty of fair representation in failing to notify the member-grievant of the hearing. The Court noted, however, that

> [t]he union knew that no other witnesses would testify for him [the grievant]. Under these circumstances his presence was essential for a fair hearing. The union representative's preparation was perfunctory. He failed to investigate Thompson's complaint properly as evidenced by his lack of knowledge . . . .
>
> . . . . .
>
> Taken singly the union's omissions might not constitute lack of fair representation. . . . *It is the failure to give notice coupled with inadequate preparation and presentation* that demonstrates a breach of the union's duty to represent Thompson properly. *Id.* at 239. [Emphasis added].

In the instant case, plaintiffs' positions were defended by the Company's representative. Since the Company had chosen plaintiffs on the basis of their qualifications, the Company defended that selection at the arbitration hearing. Defendant Union did not breach its duty to plaintiffs simply because it pursued the grievances of other members who sought to displace plaintiffs in the classification. *Cf., Humphrey v. Moore,* 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); *Ford Motor Company v. Huffman,* 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). Plaintiffs' interests were adequately represented by defendant Company. Under these circumstances, no liability should attach for the failure to notify plaintiffs of the arbitration hearing. *Ramsey v. National Labor Relations Board,* 327 F.2d 784 (7th Cir.

1964); *Siskey v. Teamsters Local 261,* 419 F.Supp. 48 (W.D.Pa.1976); *Whitten v. Anchor Motor Freight, Inc.,* 521 F.2d 1335 (6th Cir. 1975).

[3] The Court also concludes that there was no breach of the duty of fair representation, nor breach of the collective bargaining agreement in re-submitting the arbitration decision to the arbitrator. The decision as originally rendered could not be implemented by the parties; six men had been chosen for four openings. The proper course of action was to resubmit the same to the arbitrator for clarification. *Hanford Atomic Metal Trades Council, AFL-CIO v. General Electric Company,* 353 F.2d 302 (9th Cir. 1965); *Smith v. Union Carbide Corporation,* 350 F.2d 258 (6th Cir. 1965); *International Brotherhood of Electrical Workers, Local 369, AFL-CIO v. Olin Corporation,* 471 F.2d 468 (6th Cir. 1972); *Local 719, American Bakery and Confectionery Workers of America, AFL-CIO v. National Biscuit Company,* 378 F.2d 918 (3d Cir. 1967).

[4] Plaintiffs lastly contend that the union failed to accept their grievances, following the supplemental decision of the arbitrator. At that point in time, the union held the belief that the arbitration decision was then final and that no more grievances could be filed. The actions of the union in refusing the grievances failed to evidence any of the arbitrariness, discrimination or bad faith required to sustain a claim of breach of the duty of fair representation. *Cf., Vaca v. Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

Accordingly, defendants' motion will be granted and plaintiffs' motion for supplementary judgment in accordance with the jury's advisory verdict will be denied.

Supreme Court, U. S.
FILED
JUL 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LOCAL 13889, UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

CHARLES W. SMITH, JOHN PASLEY AND RALPH SERINI,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether the Appeals Court properly sustained the jury verdict against the Company and the Union, since the only instruction given by the trial court as to the liability of both the Company and the Union reflects with certainty that the jury reached its verdict solely on the resubmission proposition, an approved submissible issue for the jury.

2. Can petitioner Union obtain a new trial where the Union failed to make specific objections to respondents' instructions before the trial court as required by Fed.R.Civ.P. 51.

LIST OF PARTIES TO THE PRECEEDING

Petitioner has failed to include Hussmann Refrigerator Company as a respondent in this proceeding or otherwise comply with Rule 19.6 of this Court, effective June 30, 1980 (Prior Rule 21.4).

Hussmann has by letter dated June 30, 1980, informed the Clerk of this Court that it does not intend to file a response to the petition or otherwise participate in the cause.

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CHARLES W. SMITH, JOHN PASLEY AND RALPH SERINI,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

FEDERAL RULE OF CIVIL PROCEDURE

Fed.R.Civ.P. 51. *Instructions to Jury: Objection*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as

error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Respondents Smith, Pasley, and Serini are employees[1] who were selected by the Company's[2] foreman for the classification of maintenance pipefitter by reason of skill and ability after they bid and were interviewed by the foreman for the position (App. 7a)[3].

After their selection, the Union commenced processing four grievances by senior employees through the five-step grievance and arbitration procedure against the selection of respondents (App. 8a).

The matters occurring at the first arbitration hearing, although noteworthy, are not commented on here.

The arbitrator issued an award placing respondents in the maintenance pipefitter classification along with another employee and two of the grievants, making a total of six (App. 9a).

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[1] This action was commenced by three employees, not four as alleged in petitioner's brief, p. 3.

[2] Local 13889, United Steelworkers of America is referred to in this brief as Union, and Hussmann Refrigerator Company is referred to as Company. Respondents are the employee plaintiffs; Hussmann was not made a respondent by petitioner.

[3] App. is Appendix to Petition For Writ of Certiorari filed by petitioner. Tr. is Transcript Of Proceedings, May 24, 1977.

After the award, Union and Company officials met and agreed privately to place four employees in the classification and not six, and agreed as to the names and place in classification of the four (App. 9a). Under this agreement two of the respondents, Smith and Serini, would be removed from classification and one, Pasley, would be placed in fourth position in classification with another grievance to be processed into arbitration against him (App. 9a, 10a).

Thereafter, officials of the Company and the Union met privately with the arbitrator to have the arbitration award changed without the presence of respondents or any representatives on their behalf, and they told the arbitrator which four employees should receive the positions pursuant to their previous meeting (App. 9a, 29a). No additional testimony was taken (App. 9a). The arbitrator rendered a second award in accordance with the agreement of the Union and the Company (App. 10a). Smith and Serini lost their classifications and Pasley was placed fourth in classification (App. 10a). No notice was given to respondents that an agreement had been entered into between the Company and the Union, no notice was given to respondents that the matter was being resubmitted to the arbitrator, and no one represented respondents' rights at this arbitration. This second arbitration, a rearbitration, took place despite the provision of the collective bargaining agreement that arbitration shall be "final and binding" (App. 29a, 39a).

Thereafter respondent Pasley did have an arbitration on the challenge to his fourth position in classification; he requested to appear at the arbitration but his request was denied. The grievant appeared, but the grievance was denied (App. 10a).

After these events, respondents prepared grievances challenging the second award, but the Union would not accept the grievances, would not sign the grievances or process them or place the matter of their treatment on the agenda of a Union meeting, nor would the Union grant respondents permission to

speak to the Union membership about their treatment (App. 11a, 30a).

In its Order on Petition For Rehearing,[4] the majority of the Appeals Court stated that the subsequent collaboration between the Company and the Union for the purpose of obtaining a modification of the previous arbitration award, without notice or opportunity to respondents to protect their rights, deprived them of valuable employment rights and constituted sufficient evidence for the jury to decide that the Union had breached its duty of fair representation to respondents and that the Company had breached its collective bargaining agreement (App. 3a).

The only instruction given by the trial court as to the liability of both the Company and the Union, the two parties against whom the jury brought back a verdict, contained only this approved resubmission issue (Tr. 557-558, *see* App. 36a). The Union here agreed that this was an approved submissible issue.

The Union made the following objection to all of respondents' verdict director instructions before the trial court:

> The objection of the defendant Union is that the verdict directors are inconsistent to the evidence, and they are stated in the disjunctive, they are inconsistent to the case law cited to the court in the Union's pretrial motions and brief, and they are inconsistent to the instructions previously given, and for those reasons we object (Tr. 510).

The Appeals Court affirmed the damage awards of the jury, which totaled $9,000.00, in favor of respondents Smith and

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[4] The Order on Petition for Rehearing filed by the Appeals Court came about after the Company filed a Petition For Rehearing before the court en banc. The Union filed no petition for rehearing within the applicable time before the court en banc, but merely filed its petition after the court had passed on the Company's petition.

Pasley and against both defendants with the apportionment of 50% each from the Company and the Union (App. 3a, Tr. 568-569).

The jury also returned a special verdict in response to special interrogatories in favor of restoring respondents' seniority and classification to them. The trial court rejected the jury's advisory recommendation. The Appeals Court requested the District Court to reconsider the advisability of implementing the jury's recommendation (App. 3a, 38a).

Although the Company has been held liable by the Appeals Court, it has not petitioned for a Writ Of Certiorari here, and has informed the Clerk of this Court that it does not intend to file a response to the petition or otherwise participate in this cause.

SUMMARY OF ARGUMENT

I.

The Appeals Court held that there was sufficient evidence for the jury to have found that the Union had breached its duty of fair representation and that the Company had breached its collective bargaining agreement on the issue of the resubmission by these parties of respondents' employment rights to the arbitrator.

Since only one instruction submitted to the jury would allow the jury to find both the Union and the Company liable on this single issue, and since the jury did find both the Union and Company liable, it is obvious that the jury only considered the verdict director instruction given by the trial court against both defendants in their verdict.

Since the record reflects the exact basis for the jury's verdict, and that basis was properly submitted, then the jury verdict must be upheld.

II.

The objection raised by the Union to respondents' verdict directors before the trial court was general, and did not specifically call the trial court's attention to the precise nature of the alleged error. Since the charge to the jury as to the Union contained correct propositions, the Union had to distinctly state the matter to which it objected and the grounds of its objection.

In this context, the Union may not benefit by a general objection to obtain a new trial.

REASONS FOR DENYING THE WRIT

I.

The instructions cited by petitioner solely relating to the Union have no relevance here for the verdict by the jury was against both the Union and the Company, based upon one instruction given by the court relating to the liability of both the Company and the Union. This instruction contained only one issue, the resubmission of respondents' employment rights to the arbitrator following the arbitrator's initial decision.[3] The Union concedes that this issue was properly submitted.

The Appeals Court en banc approved this proposition as a submissible issue to the jury. It held in its Order On Petition For Rehearing that the majority of the court determined:

> The subsequent collaboration between the employer, Hussmann Refrigerator Company, and the Union, for the purpose of obtaining a modification of the previous arbitration award, without notice or opportunity to junior

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[3] This instruction in pertinent part states:

> Third, that the resubmission of the classifications to the arbitrator was a violation of the collective bargaining agreement since the first arbitration was final and binding on the parties; or if you find,
>
> Fourth, that the resubmission to the arbitrator deprived plaintiffs of their classifications or place in classification of Maintenance Pipe Fitter under the collective bargaining agreement since the Union and Hussmann agreed before the arbitration that the four senior men should hold the classification of Maintenance Pipe Fitter;
>
> . . .
>
> then your verdict should be for the plaintiffs and against defendants, Hussmann Refrigerator Company and United Steelworkers of America, Local 13889. (Tr. 557-558; *see* App. 36a)

> employees Smith, Pasley, and Serini to protect their rights, operated to deprive appellants of valuable employment rights and constituted sufficient evidence in this case for a jury to decide that the Union had breached its duty of fair representation to appellants and that the Company had breached its collective bargaining agreement. (App. 3a)

The evidence on the resubmission to the arbitrator as constituting a breach of the duty of fair representation as to the Union and a violation of the collective bargaining agreement as to the Company was so substantial that the Appeals Court found that there was collaboration between the employer and the Union; bad faith in the elements following the first arbitration up to and including the resubmission; failure of the Union to act in good faith; and complete abandonment of respondents by the Company (App. 3a, 39a, 40a).

There were three verdict forms submitted to the jury as to each of the respondents' claims for relief. One verdict form was for each respondent and against both defendants, Union and Company, with an apportionment of the damages to be paid by each which could be represented by percentages; another was a verdict form for each respondent against the Union solely; and the third, a finding in favor of both defendants (Tr. 564, 565).

The jury found in favor of respondent Charles W. Smith against both the Company and the Union for $6,500.00 and apportioned the sum of 50% against the Company and 50% against the Union, and found in favor of respondent John Pasley against the Company and the Union for $2,500.00 and apportioned the sum of 50% against the Company and 50% against the Union (Tr. 568, 569).

It is obvious that since the jury brought back a verdict against both the Company and the Union with its equal apportionment of damages, that the jury only considered the verdict director instruction given by the trial court against both defendants in their verdict. It is presumed that the jury followed the instruc-

tions correctly as they were given. *See Pittman* v. *Littlefield,* 438 F.2d 659, 662 (1st Cir. 1971); 9 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil § 2558, at 668 (1971).

The Appeals Court decision is in total accord with decisions of this Court cited by petitioner. The record is clear and certain here that the sole basis for the jury verdict against the Company and the Union was the issue of the resubmission of respondents' employment rights to the arbitrator following the first arbitration award. No other issues were presented in the verdict director against the Company and the Union.

No question is raised here by the Union that the Appeals Court erred in holding that the Union's collaboration with the Company in resubmitting respondents' employment rights to the arbitrator was a submissible issue on its breach of its duty of fair representation and submissible as to the Company on its breach of the collective bargaining agreement.

The Company has not filed a petition for certiorari, it has informed the Clerk of this Court that it does not intend to file a response to the Union's petition. It has apparently accepted its liability under the decision of the Appeals Court that the issue of the resubmission was an appropriate one for the jury, and apparently accepted that the record supported the basis for the jury's verdict.

Further, the Company and not petitioner filed a Petition For Rehearing within the applicable time after the en banc decision. The Union filed its Petition For Rehearing only after the Appeals Court en banc had issued its order on the Company's petition.

It is clear that the question raised by the Union as to verdict directors directed solely to it was not an appropriate question to be presented here, that the record of the instruction directing liability as to the Company and the Union is the sole ap-

propriate charge, and that the verdict of the jury against the Company and the Union was based solely on this approved re-submission issue.

II.

Although Point I. above answers the question presented by the Union, respondents also comment on the form of objection raised by the Union to the verdict director instructions against the Union, although the instructions solely as to the Union, as pointed out *supra,* are not relevant items of discussion here.

The objection[6] raised by the Union's lawyer to respondents' verdict directors before the trial court was general, and no specific objections were made as required by Fed. R. Civ. P. 51. The attorney did not direct the trial court to the precise point of objection. *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U.S. 584, 596 (1884).

For at least 112 years, this Court has held that in a situation, such as here, where the charge as to the Union does contain propositions which are correct, and which the Union is not contesting here, the objecting party may not benefit by a general exception. *Lincoln* v. *Claflin,* 74 U.S. (7 Wall.) 132, 139 (1868).

In *Palmer* v. *Hoffman,* 318 U.S. 109, 119 (1943), this Court stated:

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[6] The objection of the Union to the instructions of respondents:

> The objection of the defendant Union is that the verdict directors are inconsistent to the evidence, and they are stated in the disjunctive, they are inconsistent to the case law cited to the court in the Union's pretrial motions and brief, and they are inconsistent to the instructions previously given, and for those reasons we object (Tr. 510).

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.

This Court stated in *Palmer* v. *Hoffman, supra* at 119, that this is a long standing rule of federal practice. *Pennsylvania R.R. Co.* v. *Minds,* 250 U.S. 368, 375 (1919); *Norfolk & Western Ry.* v. *Earnest,* 229 U.S. 114, 122 (1913); *McDermott* v. *Severe,* 202 U.S. 600, 611 (1906); *Beaver* v. *Taylor,* 93 U.S. 46, 54-55 (1876).

A perusal of the objection by the Union discloses that the trial court had no guidance from the Union as to any alleged specific error so that it could have been adequately informed.

The objection refers to no one individual item of error. This type of objection has the quality of placing the responsibility upon the trial court to examine the entire record for error. There was nothing in the objection from which the trial court could glean what error it had committed. Rule 51 and the law of this Court require that the responsibility rest with the attorney making the objection to state "distinctly the matter to which he objects and the grounds of his objection." Fed.R.Civ.P. 51.

The Union argues that there is no technical obstacle to remand, however, the record before this Court belies that claim.

CONCLUSION

For the reasons set forth above, the Petition For A Writ Of Certiorari should be denied, and this Court should refuse to issue an order reversing and remanding the judgment of the Appeals Court.

Respectfully submitted,

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